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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 3

RICHARD ALLEN, ET AL.,
PETITIONERS,

—v.—

STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT FILED SEPTEMBER 28, 1967
JURISDICTION POSTPONED JUNE 10, 1968

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Docket Entries

DATE	PROCEEDINGS
11–28–66	Complaint filed and summons issued.
11–28–66	Notification and Request for Designation of Three Judge Court filed.
11–30–66	Designation of Albert V. Bryan, U. S. Circuit Judge; Harrison L. Winter, U. S. Circuit Judge and John D. Butzner, Jr., U. S. District Judge ent. 11–30–66. Copies of pleadings mailed A. V. Bryan and delivered to Harrison L. Winter.
12–13–66	Marshal's return on summons as to all defts. executed and filed.
12–19–66	Pre-trial order ent. 12–19–66. Copies mailed as directed.
12–23–66	√ Answer of State Board of Elections filed. Copies mailed Judges.
12–27–66	Answer of Robert E. Garnett and J. F. Lipscomb filed (copies to Judges).
12–28–66	Answer of Thomas Brown and Paul Bell filed (copies mailed to Judges).
1– 9–67	Answer filed by defts. Mark Grizzard, Benj. Griffin & Forest Lankford.
2–20–67	Plaintiffs' request for admissions, filed.
2–22–67	Response of State Board of Elections to plaintiffs' request for admissions, filed.
2–24–67	Response to pltf's. request for admissions filed by Robert E. Garnett & J. F. Lipscomb.
2–27–67	Response to pltfs. request for admissions filed.

Docket Entries

DATE	PROCEEDINGS
3- 1-67	Response to pltfs. request for admissions filed.
3-17-67	Plfs' pre-trial brief rec'd.
3-21-67	List of witnesses that may be called by defts.
3-22-67	Motion for summary judgment filed by pltf.
3-22-67	List of witnesses that may be called to testify at hearing received & filed by pltfs. Certificate & exhibits attached.
3-30-67	Brief on behalf of defts., rec'd.
4-11-67	TRIAL PROCEEDINGS: Before: Hon. Albert V. Bryan and Harrison L. Winter, U. S. Circuit Judges and Hon. John D. Butzner, Jr., U. S. District Judge, sitting as a three-judge court. Parties appeared by counsel, The Attorney General's Office of Virginia and R. D. McIlwaine, III, representing State Board of Elections, William C. Carter representing defendants Garnett and Lipscomb, H. Benj. Vincent representing defendants Lankford and Griffen and Wm. R. Blandford representing defendants Brown and Bell. Messrs. Harold M. Marsh and S. W. Tucker represented plaintiffs. Issues joined. Case argued by Messrs. Marsh and Tucker for plaintiffs and Mr. R. D. McIlwaine, III, on behalf of all defendants. Adjournment.
5- 2-67	Opinion of the Court filed.
5- 2-67	Judgment order dismissing complaint and striking action from docket, with costs taxed against plfs., ent. 5-2-67 by three judge court. Copies

Docket Entries

DATE	PROCEEDINGS
	delivered by Judge Butzner's office of Opinion and order.
6–29–67	Notice of appeal to the Supreme Court of the U. S. filed by pltfs.
8–24–67	Order granting motion of plfs. to extend until 9–28–67 time to file their jurisdictional statement, ent. 8–24–67.
8–24–67	Motion to enlarge time for filing jurisdictional statement filed by plfs.
8–24–67	Order extending time for docketing appeal to and including 9–8–67 entered nunc pro tunc 8–8–67. Copies mailed counsel.
9– 8–67	Appeal Record (2 Vols.) mailed to Clerk, Supreme Court of U. S., Wash., D. C. $4.85 certified mail, return receipt requested. Copies of index mailed counsel.

Complaint

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. .....

RICHARD ALLEN, *et al.*,

Plaintiffs,

vs.

STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

COMPLAINT

1(a) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under the Fourteenth Amendment to the Constitution of the United States and under Public Law 89-110, 79 Stat. 437, known as the Voting Rights Act of 1965 (42 U.S.C. §1973, et seq.). The matter in controversy, exclusive of interest and costs, exceeds the value of ten thousand dollars.

1(b) Jurisdiction is further invoked under Title 28, United States Code, Section 1343 (3) and (4). This is an action to redress and to secure equitable relief against the deprivation, under color of State statute, regulation, custom and usage, of the right to vote as secured by the Constitution and statutes of the United States.

2(a) Plaintiffs seek a temporary restraining order and an interlocutory injunction to prevent the defendant State Board of Elections from making statement of the whole number of votes given at the general election held November 8, 1966 in the Fourth Congressional District of Virginia for a member of the House of Representatives in Congress, pending this Court's decision of the issues herein raised and compliance with such decision.

2(b) Plaintiffs seek a declaratory judgment holding that the Equal Protection Clause of the Fourteenth Amendment forbids election officials of the Commonwealth of Virginia under color of statute or otherwise to deny any voter, solely because of his inability to write, the privilege of casting a secret ballot for a person whose name is not printed on the official ballots and having such ballot counted and included in the appropriate returns; such privilege having been reserved to voters generally by Section 28 of the Constitution of Virginia and, by Section 24-252 of the Code of Virginia, being purportedly extended only to voters who can write.

2(c) Plaintiffs seek a declaratory judgment holding that the Voting Rights Act of 1965 (43 U.S.C. §1973, et seq.) forbids election officials of the Commonwealth of Virginia to deny any citizen a right to vote which is equally unrestricted as that enjoyed by other citizens and the right to have his vote counted and included in the appropriate totals of votes cast, when the sole basis for such denial is a failure of that citizen to demonstrate his ability to write.

2(d) Plaintiffs seek an injunction restraining the State Board of Elections and the other defendant election officials from failing or refusing to count and include in their

respective official returns the votes given in the general election held November 8, 1966 by the plaintiffs and others for the person of their choice to be the member of the House of Representatives from the Fourth Congressional District of Virginia whose name they inserted on official ballots by means other than handwriting and, also, an injunction restraining the State Board of Elections and the other defendant election officials and their successors in office from failing or refusing to count and from requiring or permitting any other election official to fail or refuse to count any vote hereafter given for any person solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter.

3. Plaintiffs bring this suit as a class action, pursuant to Rule 23(a) and (b)(1) and (3) of the Rules of Civil Procedure, on behalf of all persons residing in the Fourth Congressional District of Virginia who, at the general election held November 8, 1966 for a member of the House of Representatives, voted for a person not named on the official ballot as printed by inserting the name of such person on the ballot by means other than handwriting and making a check, cross mark or line immediately before the name thus inserted and whose votes thus cast were not counted and included in the official returns.

4. Each of the plaintiffs is a citizen and a voter of the Commonwealth of Virginia and is registered to vote in one of the election precincts or wards of one of the counties and cities which comprise the Fourth Congressional District of Virginia. The precinct or ward and the county or city in which each plaintiff is registered to vote is stated in his or her affidavit herewith filed.

5. At the general election held November 8, 1966 each of the plaintiffs was furnished an official ballot on which had been printed the names of two candidates for election to the House of Representatives from the Fourth Congressional District of Virginia. Immediately under the names of those two candidates each of the plaintiffs inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; each of the plaintiffs made a check, cross mark or line on the ballot immediately preceding the name thus inserted; and each of said ballots was duly deposited into the ballot box.

6. In many of the election precincts within the Fourth Congressional District of Virginia, a considerable number of persons employed the procedure described in the next preceding paragraph. Many did so because they are illiterate; some because they are not sufficiently literate to write legibly; and others because arthritis or other physical infirmities had impaired their penmanship.

7. The defendant State Board of Elections was created by statute which is codified as Section 24-24 of the Code of Virginia, 1950. The State Board of Elections is required to so supervise and co-ordinate the work of the county and city electoral boards as to obtain uniformity in their practices and proceedings and to make such rules and regulations not inconsistent with law as will be conducive to the proper functioning of such electoral boards. (Section 24-25 of the Code of Virginia, 1950). Further, it is required by statute (Section 24-285 of the Code of Virginia 1950) that the State Board of Elections on November 28, 1966 shall make statement of the whole number

of votes given at the general election held November 8, 1966 for members of the United States Senate and House of Representatives.

8. Each of the other defendants was on November 8, 1966 a judge or clerk of election duly appointed by the electoral board of his county or city for a precinct wherein one of the plaintiffs was on and prior to that day duly registered to vote.

9. On November 8, 1966 and after the polls had been closed, it was the duty of the judges of election at each of the several precincts or wards to count and ascertain the number of votes cast for each person voted for and to sign and attest returns showing the name of each person voted for, the office for which such person received such votes and the number of votes he received at such precinct or ward. Such returns as made by the judges of election at the several precincts or wards in the counties and cites which comprise the Fourth Congressional District of Virginia are the bases from which the State Board of Elections will make a statement of the whole number of votes given at the general election held November 8, 1966 in the Fourth Congressional District of Virginia for a member of the House of Representatives in Congress.

10. The judges of election in several of said precincts and specifically those who are defendants herein failed and refused to count and include in their respective returns any votes for any person whose name was inserted on an official ballot otherwise than in the handwriting of the voter. Hence the votes cast by the plaintiffs and by others who inserted the name of the person voted for

by means other than handwriting were not counted and included in the returns of total votes for the office of member of the House of Representatives from the Fourth Congressional District of Virginia.

WHEREFORE, the plaintiffs respectfully pray:

A. (1) That the Court issue a Temporary Restraining Order restraining the defendant State Board of Elections from making statement of the whole number of votes given at the general election held November 8, 1966 in the Fourth Congressional District of Virginia for a member of the House of Representatives in Congress, pending this Court's decision of the issues herein raised and compliance with such decision.

(2) That the Court convene a three-judge District Court, as required by Titel 28, United States Code, Section 2281 and 2284.

(3) That the Court enter an interlocutory injunction as required by Title 28, United States Code, Section 2281 until the issues herein raised will have been decided.

B. That the Court advance this action on the docket and order a speedy hearing of this action according to law, and upon such hearing

(1) That the Court enter a judgment declaring that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and also that the Voting Rights Act of 1965, invalidates so much of Section 24-252 of the Code of Virginia, 1950, as amended as purports to deny any voter, solely because of his inability to write, the privilege of casting a secret ballot

for a person whose name is not printed on the official ballots and having such ballot counted in the appropriate returns; such privilege having been reserved to voters generally by Section 28 of the Constitution of Virginia.

(2) That this Court enjoin and restrain the State Board of Education and the other defendant election officials from failing and refusing to count and include in their respective election returns the votes given in the general election held November 8, 1966 by the plaintiffs and others for the person of their choice to be the member of the House of Representatives from the Fourth Congressional District of Virginia whose name they inserted on official ballots by means other than handwriting.

(3) That this Court enjoin and restrain the State Board of Elections and the other defendant election officials and their successors in office from failing or refusing to count and from requiring or permitting any other election official to fail or refuse to count any vote hereafter given for any person solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter.

/s/ S. W. Tucker
Of Counsel for Plaintiffs

Hill, Tucker & Marsh
214 East Clay Street
Richmond, Virginia 23219

James M. Nabrit, III
Jack Greenberg
10 Columbus Circle, Suite 2030
New York, New York 10019

Counsel for Plaintiffs

Affidavit of Richard Allen

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Moss Election Precinct, in the County of Greensville. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of Richard Allen

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

His
/s/ RICHARD X ALLEN
Mark

[Affidavit of Notary Public Omitted]

Affidavit of Lena W. Dunn

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Moss Election Precinct, in the County of Greensville. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of Lena W. Dunn.

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

Her
/s/ LENA X DUNN
Mark

[Affidavit of Notary Public Omitted]

Affidavit of Washington Moore

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Moss Election Precinct, in the County of Greensville. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside, and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of Washington Moore

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

His
/s/ WASHINGTON X MOORE
Mark

[Affidavit of Notary Public Omitted]

Affidavit of McKinley Dunn

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Hicksford Election Precinct, in the County of Greensville. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of McKinley Dunn

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

His
/s/ McKinley X Dunn
Mark

[Affidavit of Notary Public Omitted]

Affidavit of Nora Tyler

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Belfield Election Precinct, in the County of Greensville. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of Nora Tyler

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

Her
/s/ NORA X TYLER
Mark

[Affidavit of Notary Public Omitted]

Affidavit of James Gilbert Tyler

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Belfield Election Precinct, in the County of Greensville. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of James Gilbert Tyler

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

His
/s/ JAMES GILBERT X TYLER
Mark

[Affidavit of Notary Public Omitted]

Affidavit of Fannie M. Brown

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Brown's Church Election Precinct, in the County of Cumberland. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of Fannie M. Brown

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

Her
/s/ X FANNIE M. BROWN
Mark

[Affidavit of Notary Public Omitted]

Affidavit of Patrick H. Brown

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Brown's Church Election Precinct, in the County of Cumberland. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of Patrick H. Brown

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

His
/s/ X PATRICK H. BROWN
Mark

[Affidavit of Notary Public Omitted]

Affidavit of James Donikens

On the 8th day of November, 1966 I was a qualified voter of the State of Virginia, duly registered as such in Smith's Crossroads Election Precinct, in the County of Powhatan. On that day and at the voting place for that precinct I was regularly furnished an official ballot on which had been printed names of candidates for the respective offices to be filled by the election then being held, including the names "Watkins M. Abbitt" and "Edward J. Silverman", in that order, as candidates for election to the House of Representatives from the Fourth Congressional District of Virginia.

Immediately below the name of Edward J. Silverman I inserted the name "S. W. Tucker" by pasting on the official ballot a strip of paper on which that name had been printed; and I made a cross mark ☒ on the ballot immediately preceding the name "S. W. Tucker" as so inserted. I was then unable to legibly write the name "S. W. Tucker" on the ballot.

Having thus voted for S. W. Tucker to be the member of the House of Representatives from the Fourth Congressional District of Virginia, I folded the ballot with the names of the candidates on the inside and handed same to one of the judges of election who then put it into the ballot box.

I am informed that my said vote and numerous other votes cast in the same manner were not counted by the judges and clerks of election serving at said precinct and at many other precincts within the several counties and cities which constitute the Fourth Congressional District of Virginia.

Affidavit of James Donikens

I authorize suit in my name to require my vote and other votes similarly cast to be counted and included in the official returns of the whole number of votes given in said election for member of the House of Representatives from the Fourth Congressional District of Virginia.

/s/ X *(his mark)* JAMES DONIKENS

[Affidavit of Notary Public Omitted]

Notification and Request For Designation of Three-Judge Court

To the Honorable Clement F. Haynsworth, Jr., Chief Judge of the United States Court of Appeals for the Fourth Circuit:

The plaintiffs seek a declaration that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the Voting Rights Act of 1965 invalidate portions of § 24-252, Code of Virginia 1950. The plaintiffs also seek injunctive relief.

It appearing that this action is one which, under the provisions of 28 U.S.C. § 2281 must be heard and determined by a district court of three judges, and a motion having been filed for the designation of such a court, you are hereby notified, as required by 28 U.S.C. § 2284, that the application in this action has been presented to me. You are respectfully requested to designate two other judges, at least one of whom shall be a circuit judge, to serve with me as members of the court to hear and determine the action.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

November 28, 1966

Designation of Three-Judge Court

It appearing to the undersigned Chief Judge of the Fourth Judicial Circuit of the United States that a civil action as above entitled has been instituted in the United States District Court for the Eastern District of Virginia, for the stated purpose of enjoining the enforcement of and declaring unconstitutional portions of § 24-252, Code of Virginia 1950, as being in claimed conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the Voting Rights Act of 1965; and that application for such relief was made to Honorable John D. Butzner, Jr., United States District Judge for the Eastern District of Virginia, who has notified the undersigned pursuant to § 2284 of Title 28, United States Code Annotated, of the pendency of such application, to the end that a court of three judges may be constituted, as required by § 2281, Title 28, United States Code.

Now, therefore, I do hereby designate Honorable Albert V. Bryan, United States Circuit Judge, Fourth Judicial Circuit and Honorable Harrison L. Winter, United States Circuit Judge, Fourth Judicial Circuit, to serve with the said Honorable John D. Butzner, Jr. in the hearing and determination of the above entitled action, as provided by law, the three to constitute a District Court of three judges as provided by § 2284, Title 28, United States Code.

This the 30th day of November, 1966.

/s/ (Illegible)
Chief Judge, Fourth Circuit

Let the Clerk send copies of this order to counsel of record, each defendant for whom no counsel has yet noted an appearance and the Attorney General of Virginia.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

December 19, 1966

Pre-Trial Order

It is ADJUDGED and ORDERED:

1. The defendants are directed to file their answers, if they have not already done so, together with such additional pleadings as they may deem proper, on or before January 6, 1967. The filing of answers shall not constitute a waiver of defenses and objections raised by motions.

2. The plaintiffs may file replies, if they deem it advisable, on or before January 13, 1967.

3. No additional motions or pleadings may be filed thereafter except by leave of court for good cause shown.

4. All pre-trial discovery should be completed on or before March 1, 1967.

5. All proposed exhibits and the names and addresses of all persons who may be called to testify must be filed with the Clerk of this court in Richmond twenty days prior to the date of the hearing on the merits. If the exhibits are voluminous, they should be marked by the Clerk at least two days prior to the date of trial. Formal proof of exhibits will be deemed waived unless objected to in writing at least seven days prior to the date of trial. Copies of all exhibits, lists of witnesses and briefs should be mailed to all counsel of record and the members of the three-judge court at their respective addresses.

6. Hearing on all motions, unless otherwise ordered by the court, will be deferred until the date of the hearing on the merits.

7. Plaintiffs' briefs should be filed on or before March 15, 1967. Defendants' briefs should be filed on or before April 1, 1967.

8. This case is set for hearing upon the merits and upon all motions in the United States District Court, Post Office Building, Richmond, Virginia, on Tuesday, April 11, 1967, at 11:30 A.M.

Let the Clerk send copies of this order to counsel of record, each defendant for whom no counsel has yet noted an appearance and the Attorney General of Virginia.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

December 19, 1966

Answer of State Board of Elections

Now comes the State Board of Elections of the Commonwealth of Virginia, by counsel, and answers the complaint herein and says:

1. For answer to Paragraphs 1(a) and 1(b) of the complaint, this defendant admits that the plaintiffs seek to invoke the jurisdiction of this Court under the provisions of law set forth in said paragraphs. This defendant denies that this action arises under or is authorized by any of the provisions of law specified in said paragraphs or that the matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000 or that this Court has jurisdiction of the action under any of the provisions of law set forth in Paragraphs 1(a) or 1(b) of the complaint.

2. For answer to Paragraphs 2(a), 2(b), 2(c) and 2(d) of the complaint, this defendant admits that the plaintiffs seek the temporary restraining order, injunction and declaratory judgments specified in such paragraphs. This defendant denies that plaintiffs are entitled to said temporary restraining order, injunction or declaratory judgments for any reason set forth in the complaint.

3. This defendant neither admits nor denies the allegations of Paragraphs 3, 4, 5 and 6 of the complaint and calls for strict proof of the same.

4. The allegations of Paragraph 7 of the complaint are admitted.

5. This defendant neither admits nor denies the allegations of Paragraph 8 of the complaint and calls for strict proof of the same.

6. For answer to the initial sentence of Paragraph 9 of the complaint, this defendant states that—after the polls had been closed on November 8, 1966—it was the duty of the judges of election at each of the several precincts or

wards to count and ascertain the number of votes properly cast for each person voted for and to sign and attest returns showing the name of each person properly voted for, the office for which such person received such votes and the number of legal votes he received at such precinct or ward. Such returns as made by the judges of election at the several precincts or wards in the counties and cities which comprise the Fourth Congressional District of Virginia are the bases upon which the commissioners of the counties and cities consolidate the vote and compile an abstract of the votes properly cast in the counties and cities, from which abstract the State Board of Elections will make a statement of the whole number of votes given at the general election held November 8, 1966, in the Fourth Congressional District of Virginia for a member of the House of Representatives in Congress.

7. The allegations of Paragraph 10 of the complaint are denied.

Now having fully answered, this defendant prays to be hence dismissed with its costs in this behalf expended.

STATE BOARD OF ELECTIONS OF THE
COMMONWEALTH OF VIRGINIA
By: /s/ ROBERT Y. BUTTON
Of Counsel

Robert Y. Button
Attorney General of Virginia

Kenneth C. Patty
Assistant Attorney General

R. D. McIlwaine, III
Assistant Attorney General

Supreme Court-State Library Building
Richmond, Virginia 23219

Answer of Robert E. Garnett and J. F. Lipscomb

Now comes Robert E. Garnett and J. F. Lipscomb, both of Cumberland County, Virginia, by counsel, and jointly and severally answer the complaint herein and say:

1. That J. F. Lipscomb is the correct name of the defendant designated as "J. S. Lipscomb" in the complaint.

2. For answer to paragraphs 1(a) and 1(b) of the complaint, these defendants admit that the plaintiffs seek to invoke the jurisdiction of this Court under the provisions of law set forth in said paragraphs. These defendants deny that this action arises under or is authorized by any of the provisions of law specified in said paragraphs or that the matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00 or that this Court has jurisdiction of the action under any of the provisions of law set forth in Paragraphs 1(a) or 1(b) of the complaint.

3. For answer to Paragraphs 2(a), 2(b), 2(c) and 2(d) of the complaint, these defendants admit that the plaintiffs seek the temporary restraining order, injunction and declaratory judgments specified in such paragraphs. These defendants deny that plaintiffs are entitled to said temporary restraining order, injunction or declaratory judgments for any reason set forth in the complaint.

4. These defendants neither admit nor deny the allegations of Paragraphs 3, 4, 5 and 6 of the complaint and call for strict proof of the same.

5. The allegations of Paragraph 7 of the complaint are admitted.

6. These defendants neither admit nor deny the allegations of Paragraph 8 of the complaint and call for strict proof of the same, but do allege that J. F. Lipscomb was a duly appointed clerk of election at the Brown's precinct in the County of Cumberland, Commonwealth of Virginia, on November 8, 1966, and that Robert E. Garnett was a duly appointed judge of election at the Brown's precinct in Cumberland County, Commonwealth of Virginia, on November 8, 1966.

7. For answer to the initial sentence of Paragraph 9 of the complaint, these defendants state that—after the polls had been closed on November 8, 1966—it was their duty as judge and clerk of election at their precinct, to count and ascertain the number of votes properly cast for each person voted for and to sign and attest returns showing the name of each person properly voted for, the office for which such person received such votes and the number of legal votes he received at such precinct. Such returns as made by the judges of election at their precinct in the County of Cumberland, which is a part of the Fourth Congressional District of Virginia, are the bases upon which the commissioners of the counties and cities consolidate the vote and compile an abstract of the votes properly cast in the counties and cities, from which abstract the State Board of Elections will make a statement of the whole number of votes given at the general election held November 8, 1966, in the Fourth Congressional District of Virginia for a member of the House of Representatives in Congress.

8. These defendants neither admit nor deny the allegations in Paragraph 10 of the complaint and call for strict proof of the same.

Answer of Robert E. Garnett and J. F. Lipscomb

Now having fully answered, these defendants pray to be hence dismissed with their costs in this behalf expended.

ROBERT E. GARNETT
Cumberland, Virginia

J. F. LIPSCOMB
Cumberland, Virginia

By /s/ WILLIAM C. CARTER
Of Counsel

William C. Carter
Commonwealth's Attorney
Cumberland County, Virginia

Answer of Thomas Brown

Now comes Thomas Brown, by counsel, and answers the complaint herein and says:

1. For answer to Paragraph 1(a) of the complaint, this defendant denies each and every allegation.

2. For answer to Paragraph 1(b) of the complaint, this defendant denies that this Court has jurisdiction as alleged therein and further says the plaintiffs have no valid cause of action as set forth in this Paragraph.

3. For answer to Paragraph 2(a) of the complaint, this defendant denies that the plaintiffs are entitled to a temporary restraining order and an interlocutory injunction as sought by the plaintiffs.

4. For answer to Paragraph 2(b) of the complaint, this defendant denies that plaintiffs are entitled to a declaratory judgment as sought by the plaintiffs.

5. For answer to Paragraph 2(c) of the complaint, this defendant denies that the plaintiffs are entitled to a declaratory judgment as sought by the plaintiffs.

6. For answer to Paragraph 2(d) of the complaint, this defendant denies that the plaintiffs are entitled to the injunctions sought by the plaintiffs.

7. This defendant denies the allegations of Paragraphs 3, 4 and 5 of the complaint.

8. This defendant denies the allegations of Paragraph 6 of the complaint, and especially denies that the plaintiff James Donikens is illiterate, or not sufficiently literate to

write legibly, nor had he any physical infirmities which impaired his penmanship.

9. This defendant neither admits nor denies the allegations of Paragraphs 7 and 8 of the complaint.

10. This defendant neither admits nor denies the allegations of paragraph 9 of the complaint.

11. This defendant denies the allegations of Paragraph 10 of the complaint.

Now having fully answered, this defendant prays to be hence dismissed with his costs in his behalf expended.

.....

Thomas Brown

By: .....

Of Counsel

William R. Blandford
Attorney at Law
Powhatan, Virginia

Answer of Paul Bell

Now comes Paul Bell, by counsel, and answers the complaint herein and says:

1. For answer to Paragraph 1 (a) of the complaint, this defendant denies each and every allegation.

2. For answer to Paragraph 1(b) of the complaint, this defendant denies that this Court has jurisdiction as alleged therein and further says the plaintiffs have no valid cause of action as set forth in this Paragraph.

3. For answer to Paragraph 2(a) of the complaint, this defendant denies that the plaintiffs are entitled to a temporary restraining order and an interlocutory injunction as sought by the plaintiffs.

4. For answer to Paragraph 2(b) of the complaint, this defendant denies that plaintiffs are entitled to a declaratory judgment as sought by the plaintiffs.

5. For answer o Paragraph 2(c) of the complaint, this defendant denies that the plaintiffs are entitled to a declaratory judgment as sought by the plaintiffs.

6. For answer to Paragraph 2(d) of the complaint, this defendant denies that the plaintiffs are entitled to the injunctions sought by the plaintiffs.

7. This defendant denies the allegations of Paragraphs 3, 4 and 5 of the complaint.

8. This defendant denies the allegations of Paragraph 6 of the complaint, and especially denies that the plaintiff James Donikens is illiterate, or not sufficiently literate to

write legibly, nor had he any physical infirmities which impaired his penmanship.

9. This defendant neither admits nor denies the allegations of Paragraphs 7 and 8 of the complaint.

10. This defendant neither admits nor denies the allegations of Paragraph 9 of the complaint.

11. This defendant denies the allegations of Paragraph 10 of the complaint.

Now having fully answered, this defendant prays to be hence dismissed with his costs in this behalf expended.

/s/ .....
Paul Bell
By: /s/ Wm R Blandford
Of Counsel

William R. Blandford
Attorney at Law
Powhatan, Virginia

Answer of Mark Grizzard, Benjamin Griffin and Forest Lankford

The defendants, Mark Grizzard, Benjamin Griffin and Forest Lankford, come now and answers the complaint herein as follows:

1. For answer to Paragraphs 1(a) and 1(b) of the complaint, the defendants deny that this action arises under or is authorized by any of the provisions of law specified in said Paragraphs or that the matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00 or that this Court has jurisdiction of the action under any of the provisions of law set forth in Paragraphs 1(a) or 1(b) of the complaint.

2. For answer to Paragraphs 2(a), 2(b), 2(c) and 2(d) of the complaint, the defendants deny that plaintiffs are entitled to said temporary restraining order, injunction or declaratory judgments for any reason set forth in the complaint.

3. The defendants neither admit nor deny the allegations of Paragraphs 3, 4, 5, 6 and 7 of the complaint and calls for strict proof of the same.

4. For answer to Paragraph 8 of the complaint, the defendants admit that on 8 November 1966 they were acting as judges of the election duly appointed by the Electoral Board of Greensville County in their respective precincts but will require strict proof of the remaining allegation of that Paragraph.

5. The defendants deny the allegations contained in Paragraph 9 of the complaint.

Answer of Mark Grizzard, Benjamin Griffin and Forest Lankford

6. The defendants deny the allegations of Paragraph 10 of the complaint.

7. The defendants reserve the right to amend their answer, at any time as they may be advised and further state that they will rely upon any and all available defenses.

Mark Grizzard
Benjamin Griffin
Forest Lankford
By /s/ H. Benj Vincent
Counsel

/s/ H. Benj Vincent
H. Benjamin Vincent
Vincent, Warriner & Outten
332 South Main Street
Emporia, Virginia
Attorney for Commonwealth
Greensville County, Virginia

Request for Admissions

Under provisions of Rule 36(a) of the Federal Rules of Civil Procedure, plaintiffs request that, on or before March 1, 1967, the defendants make admission of the matters of fact hereinafter set forth:

One

That on November 8, 1966, Mark Grizzard was a duly appointed judge of election for Moss Precinct in the County of Greensville and served as such.

Two

That on November 8, 1966, Forest Lankford was a duly appointed clerk for Hicksford Precinct in the County of Greensville and served as such.

Three

That on November 8, 1966, Benjamin Griffen was a duly appointed judge of election for Belfield Precinct in the County of Greensville and served as such.

Four

That on November 8, 1966, Robert E. Garnett was a duly appointed judge of election for Brown's Church Precinct in the County of Cumberland and served as such.

Five

That on November 8, 1966, J. F. Lipscomb was a duly appointed clerk for Brown's Church Precinct in the County of Cumberland and served as such.

Request for Admissions

SIX

That on November 8, 1966, Thomas Brown was a duly appointed judge of election for Smith Cross Roads Precinct in the County of Powhatan and served as such.

SEVEN

That on November 8, 1966, Paul Bell was a duly appointed judge of election for Smith Cross Roads Precinct in the County of Powhatan and served as such.

EIGHT

That voting machines were used in the November 8, 1966 general elections in the Fourth Congressional District of Virginia, only in the City of Colonial Heights, in the City of Hopewell, in the City of Suffolk and in some of the election precincts of the City of Chesapeake.

NINE

That white paper ticket ballots, as described in Section 24-215 of the Code of Virginia, were used for the November 8, 1966 general election in some of the election precincts in the Fourth Congressional District of Virginia.

TEN

That white paper ticket ballots, as described in Section 24-215 of the Code of Virginia, were used for the November 8, 1966 general election in the City of Petersburg, in the City of Franklin, and in all of the counties which are a part of the Fourth Congressional District of Virginia.

ELEVEN

That, except in those precincts in which voting machines were in use, the official ballots as printed for the General Election held November 8, 1966 contained the names of Watkins M. Abbitt and Edward J. Silverman, in that order, as candidates for the House of Representatives from the Fourth Congressional District of Virginia; and that no person's name appeared below the name of Edward J. Silverman on the official ballots as printed.

TWELVE

That on November 8, 1966, in at least one precinct in the Fourth Congressional District of Virginia and after the polls had been closed and the ballots had been taken from the ballot box, at least one of the official ballots was found to have been marked with a check, cross mark or line immediately preceding a strip of paper which had been pasted on the ballot immediately under the name Edward J. Silverman, on which strip the name "S. W. Tucker" had been printed.

THIRTEEN

That when the ballots were removed from the ballot box at Moss Precinct in Greensville County following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on the preceding page.

FOURTEEN

That on November 8, 1966, there were persons qualified and registered to vote at Moss Precinct in Greensville County who, being illiterate or unlettered, were unable to write legibly.

Request for Admissions

FIFTEEN

That the ballots which had been altered and marked as described in item TWELVE on the preceding page and placed in the ballot box for Moss Precinct in Greensville County were not counted and included in the official returns as votes validly cast for S. W. Tucker.

SIXTEEN

That when the ballots were removed from the ballot box at Hicksford Precinct in Greensville County following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on the preceding page.

SEVENTEEN

That on November 8, 1966 there were persons qualified and registered to vote at Hicksford Precinct in Greensville County who, being illiterate or unlettered, were unable to write legibly.

EIGHTEEN

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the ballot box at Hicksford Precinct in Greensville County were not counted and included in the official returns as votes validly cast for S. W. Tucker.

NINETEEN

That when the ballots were removed from the ballot box at Belfield Precinct in Greensville County, following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on page three.

Request for Admissions

TWENTY

That on November 8, 1966 there were persons qualified and registered to vote at Belfield Precinct in Greensville County who, being illiterate or unlettered, were unable to write legibly.

TWENTY-ONE

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the ballot box at Belfield Precinct in Greensville County were not counted and included in the official returns as votes validly cast for S. W. Tucker.

TWENTY-TWO

That when the ballots were removed from the ballot box at Brown's Church Precinct in Cumberland County, following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on page three.

TWENTY-THREE

That on November 8, 1966 there were persons qualified and registered to vote at Brown's Church Precinct in Cumberland County who, being illiterate or unlettered, were unable to write legibly.

TWENTY-FOUR

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the ballot box at Brown's Church Precinct in Cumberland County were not counted and included in the official returns as votes validly cast for S. W. Tucker.

Request for Admissions

TWENTY-FIVE

That when the ballots were removed from the ballot box at Smith's Cross Roads Precinct in Powhatan County following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on page three.

TWENTY-SIX

That on November 8, 1966 there were persons qualified and registered to vote at Smith's Cross Roads Precinct in Powhatan County who, being illiterate or unlettered, were unable to write legibly.

TWENTY-SEVEN

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the ballot box at Smith's Cross Roads Precinct in Powhatan County were not included and counted in the official returns as votes validly cast for S. W. Tucker.

TWENTY-EIGHT

That in at least one precinct in Southampton County when the ballots were removed from the ballot box following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on page three.

TWENTY-NINE

That on November 8, 1966 there were persons qualified and registered to vote at such precinct or precincts in Southampton County who, being illiterate or unlettered, were unable to write.

Request for Admissions

THIRTY

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the ballot box at such precinct or precincts in Southampton County were not counted and included in the official returns as votes validly cast for S. W. Tucker.

THIRTY-ONE

That in at least one precinct in Nansemond County, when the ballots were removed from the ballot box following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on page three.

THIRTY-TWO

That on November 8, 1966 there were persons qualified and registered to vote at such precinct or precincts in Nansemond County who, being illiterate or unlettered, were unable to write.

THIRTY-THREE

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the ballot box at such precinct or precincts in Nansemond County were not counted and included in the official returns as votes validly cast for S. W. Tucker.

THIRTY-FOUR

That in at least one precinct in the City of Chesapeake, when the ballots were removed from the ballot box following the closing of the polls on November 8, 1966 some of

the ballots were found to have been altered and marked in the manner set forth in item TWELVE on page three.

THIRTY-FIVE

That on November 8, 1966 there were persons qualified and registered to vote at such precinct or precincts in the City of Chesapeake who, being illiterate or unlettered, were unable to write.

THIRTY-SIX

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the ballot box at such precinct or precincts in the City of Chesapeake were not counted and included in the official returns as votes validly cast for S. W. Tucker.

THIRTY-SEVEN

That in at least one precinct in Prince Edward County when the ballots were removed from the ballot box following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on page three.

THIRTY-EIGHT

That on November 8, 1966 there were persons qualified and registered to vote at such precinct or precincts in Prince Edward County who, being illiterate or unlettered, were unable to write.

THIRTY-NINE

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the

ballot box at such precinct or precincts in Prince Edward County were not counted and included in the official returns as votes validly cast for S. W. Tucker.

FORTY

That in at least one precinct in Nottoway County when the ballots were removed from the ballot box following the closing of the polls on November 8, 1966 some of the ballots were found to have been altered and marked in the manner set forth in item TWELVE on page three.

FORTY-ONE

That on November 8, 1966 there were persons qualified and registered to vote at such precinct or precincts in Nottoway County who, being illiterate or unlettered, were unable to write.

FORTY-TWO

That the ballots which had been altered and marked as described in item TWELVE on page three and placed in the ballot box at such precinct or precincts in Nottoway County were not counted and included in the official returns as votes validly cast for S. W. Tucker.

/s/ S. W. TUCKER
Of Counsel for Plaintiffs

HILL, TUCKER & MARSH
214 East Clay Street
Richmond, Virginia 23219

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York

Counsel for Plaintiffs

Response to Plaintiffs' Request for Admissions Filed by State Board of Elections

Now comes the State Board of Elections of the Commonwealth of Virginia, by counsel, and responds to plaintiffs' request for admissions heretofore filed in this cause and says:

1. This defendant has no knowledge of the matters set forth in Paragraphs One through Seven or Paragraphs Twelve through Forty-Two of said request and neither admit nor deny the same.

2. This defendant admits the accuracy of the matters set forth in Paragraphs Nine and Eleven of said request for admissions.

3. For response to Paragraph Eight of said request for admissions, this defendant is advised that voting machines were used in the November 8, 1966, general election in the Fourth Congressional District of Virginia in the City of Colonial Heights, the City of Hopewell and some of the precincts in the City of Chesapeake and Nansemond County, but such voting machines were not used in the City of Suffolk.

4. For response to Paragraph Ten of said request for admissions, this defendant is advised that white paper ticket ballots as described in Section 24-215 of the Virginia Code were used in the November 8, 1966, general election in the Fourth Congressional District in the City of Petersburg, the City of Franklin, the City of Suffolk and in

parts of all of the counties which are located in the Fourth Congressional District of Virginia.

STATE BOARD OF ELECTIONS OF THE COMMONWEALTH OF VIRGINIA

By: /s/ R. D. McILWAINE, III
Of Counsel

Robert Y. Button
Attorney General of Virginia

Kenneth C. Patty
Assistant Attorney General

R. D. McIlwaine, III
Assistant Attorney General

Supreme Court—State Library Building
Richmond, Virginia 23219

Response to Plaintiffs' Request for Admissions Filed by Robert E. Garnett and J. F. Lipscomb

Now come Robert E. Garnett and J. F. Lipscomb, by counsel, and jointly and severally respond to plaintiffs' request for admissions heretofore filed in this cause, and say:

1. These defendants have no knowledge of the matters set forth in Paragraphs One through Three, Paragraphs Six through Twenty-One, Paragraph Twenty-Three, or Paragraphs Twenty-Five through Forty-Two of said request and neither admit nor deny the same.

2. The defendant, Robert E. Garnett, admits the accuracy of Paragraph Four of said request.

3. The defendant J. F. Lipscomb admits the accuracy of Paragraph Five of said request.

4. The defendants Robert E. Garnett and J. F. Lipscomb both admit the accuracy of Paragraphs Twenty-Two and Twenty-Four of said request.

ROBERT E. GARNETT
Cumberland, Virginia

J. F. LIPSCOMB
Cumberland, Virginia
By /s/ WM C CARTER
Of Counsel

William C. Carter
Commonwealth's Attorney
Cumberland, Virginia

Response to Plaintiffs' Request for Admissions Filed by Thomas Brown and Paul Bell

Now come Thomas Brown and Paul Bell, by counsel, and respond to plaintiffs' request for admissions heretofore filed in this cause and say:

1. These defendants have no knowledge of the matters set forth in Paragraphs One through Five of said request and neither admit nor deny the same.

2. These defendants admit the accuracy of the matters set forth in Paragraphs Six and Seven of said request.

3. As to Paragraph Nine and Ten, these defendants state that white paper ticket ballots as described in Section 24-215 of the Code of Virginia were used at Smith's Cross Roads precinct in Powhatan County on November 8, 1966, but they have no knowledge as to the type of ballots used at any other precinct in the Fourth Congressional District.

4. These defendants have no knowledge of the matters set forth in Paragraphs Eight and Eleven of the request and further they have no knowledge of the matters set forth in paragraphs Thirteen through Twenty-Four and Paragraphs Twenty-Eight through Forty-Two and neither admit nor deny the same.

5. For Paragraphs Twelve and Twenty-Five these defendants state that some of the ballots had been altered and marked in the manner set forth in Paragraph Twelve on Page Three of the request.

6. For Paragraph Twenty-Six the defendants state that they have no knowledge of the matters set forth therein

as to parties being illiterate or unlettered and therefore unable to write legibly but the defendant Paul Bell states that he helped at least two parties at the polls because of physical infirmities.

7. These defendants state for Paragraph Twenty-Seven that ballots marked as described in Item Twelve were not counted as ballots validly cast for S. W. Tucker.

THOMAS BROWN
PAUL BELL
By: /s/ WILLIAM R. BLANDFORD
By: T.L.L. III Of Counsel

Honorable Albert V. Bryan
U. S. Circuit Judge, Alexandria, Virginia

Honorable Harrison L. Winter
U. S. Circuit Judge, Baltimore, Maryland

Honorable John D. Butzner
U. S. District Judge, Richmond, Virginia

Honorable R. D. McIlwaine, III
Assistant Attorney General

Honorable William C. Carter
Commonwealth Attorney for Cumberland County
Cumberland, Virginia

Honorable H. Benjamin Vincent
Commonwealth Attorney for Greensville County
Emporia, Virginia

Response to Plaintiffs' Request for Admissions Filed by Mark Grizzard, Forest Lankford and Benjamin Griffin

Now comes Mark Grizzard, Forest Lankford and Benjamin Griffin, by counsel, and respond to plaintiffs' request for admissions hereto filed in this cause as follows:

1. These defendants admit the accuracy of the matters set forth in Paragraphs One, Two and Three of said request.

2. These defendants have no knowledge of the matters set forth in the following Paragraphs of said request, Paragraphs Four through Twelve, Fourteen, Seventeen, Twenty, Twenty-Two through Forty-Two and neither admit or deny the same.

3. These defendants admit the accuracy of the matters set forth in Paragraphs Thirteen, Fifteen, Sixteen, Eighteen, Nineteen and Twenty-One of the said request.

Mark Grizzard
Forest Lankford
Benjamin Griffin
By /s/ H BENJ VINCENT
Counsel

Honorable Albert V. Bryan
U. S. Circuit Judge
Alexandria, Virginia

Honorable Harrison L. Winter
U. S. Circuit Judge
Baltimore, Maryland

Response to Plaintiffs' Request for Admissions Filed by Mark Grizzard, Forest Lankford and Benjamin Griffin

Honorable John D. Butzner
U. S. District Judge
Richmond, Virginia

Honorable R. D. McIlwaine, III
Assistant Attorney General
Richmond, Virginia

Honorable William C. Carter
Commonwealth Attorney for Cumberland County
Cumberland, Virginia

Honorable William R. Blandford
Attorney at Law
Powhatan, Virginia

Defendants' Exhibit #1

(Letter to All Registrars)

COMMONWEALTH OF VIRGINIA

[EMBLEM]

STATE BOARD OF ELECTIONS
STATE CAPITOL
RICHMOND 23219

August 12, 1965

TO ALL REGISTRARS:

On August 6, 1965, the "Voting Rights Act of 1965" enacted by the Congress of the United States became effective and is now in force in Virginia. Under the wording of this Act, use of the Virginia registration forms in the manner required by Virginia law prior to August 6th is now prohibited. So far as I am now advised, the information required on the registration forms heretofore sent you on April 19, 1965 can still be obtained at the time of registration.

These forms may be obtained by an applicant from the Registrar at the usual time and place for registration. The forms may be completed only at the place where obtained and shall be submitted by the applicant in person at that place.

The Registrar shall review the forms in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely, or if the applicant is not able personally to complete the forms in whole or in part because

Defendants' Exhibit #1

of lack of literacy or otherwise, or has difficulty in doing so, the Registrar shall orally examine the applicant and record the pertinent information on the forms or otherwise assist the applicant in completing the forms. After the forms are completed, the Registrar shall require the applicant to take an oath or affirmation as to the truth of the answers and to sign his name or make his mark thereon.

If more information is obtained that makes desirable a change in the present registration forms, such information will be furnished you.

Sincerely yours,
STATE BOARD OF ELECTIONS
/s/ LEVIN NOCK DAVIS
Levin Nock Davis, Secretary

Defendants' Exhibit #2

(Memo to General Registrars)

COMMONWEALTH OF VIRGINIA

[EMBLEM]

STATE BOARD OF ELECTIONS
STATE CAPITOL
RICHMOND 23219

October 15, 1965

MEMO TO THE GENERAL REGISTRARS

Today this office is mailing a supply of bulletins to the secretaries of the electoral boards throughout the State to be distributed to each judge of election. You will find a copy of this bulletin enclosed as I know this is a question of vital concern to you also.

With best wishes, I am

Very truly yours,

STATE BOARD OF ELECTIONS
/s/ LEVIN NOCK DAVIS
Levin Nock Davis, Secretary

Enclosure

Defendants' Exhibit #3

(Letter to Secretaries of Electoral Boards)

COMMONWEALTH OF VIRGINIA

[EMBLEM]

STATE BOARD OF ELECTIONS
STATE CAPITOL
RICHMOND 23219

October 15, 1965

TO THE SECRETARIES OF THE ELECTORAL BOARDS:

I am sending you a supply of a bulletin "To ALL ELECTION JUDGES." When the official ballots are delivered to the judges of election as required by Section 24-230 of the Code, you will please deliver along with the package of ballots three (3) of these bulletins—one for each precinct judge.

At the time you deliver the official ballots and the bulletin, you will please direct the attention of the judge to whom delivery is made to Sections 24-231 and 24-232 of the Code and insist upon strict compliance and call special attention to the penalties for non-compliance as set forth in Section 24-233 of the Code.

Very truly yours,

STATE BOARD OF ELECTIONS
/s/ LEVIN NOCK DAVIS
Levin Nock Davis, Secretary

Defendants' Exhibit #4

(Bulletin to All Judges of Elections)

COMMONWEALTH OF VIRGINIA

[EMBLEM]

STATE BOARD OF ELECTIONS
STATE CAPITOL
RICHMOND 23219

October 15, 1965

BULLETIN FROM STATE BOARD OF ELECTIONS

TO ALL JUDGES OF ELECTION:

On August 6, 1965, the "Voting Rights Act of 1965" enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

Defendants' Exhibit #4

These instructions also apply to precincts in which voting machines are used.

Very truly yours,
STATE BOARD OF ELECTIONS
/s/ LEVIN NOCK DAVIS
Levin Nock Davis, Secretary

"Courtesy Makes Driving Safer"

Motion for Summary Judgment

Plaintiffs move that the court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in prayers B (1) and (3) of the Complaint, on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon (a) the complaint and answers thereto (b) the affidavits of the plaintiffs attached to the complaint and therewith served on each defendant, (c) plaintiffs' requests for admission as to which there was neither sworn denial nor written objections in accordance with Rule 36 (a), and (d) plaintiffs' exhibits 1, 2 and 3.

/s/ HAROLD M. MARSH
Of Counsel for Plaintiffs

HILL, TUCKER & MARSH
214 East Clay Street
Richmond, Virginia

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York

Counsel for Plaintiffs

Memorandum of the Court

John D. Butzner, Jr., District Judge:

The plaintiffs, registered voters who are unable to spell accurately or to write legibly, attempted to cast their votes for a write-in candidate in the 1966 congressional election. Each pasted a sticker, upon which the write-in candidate's name was printed, on the official ballot under the names of listed candidates and appropriately marked the ballot immediately preceding the sticker. These ballots were not tabulated for the write-in candidate. Upon these undisputed facts, the plaintiffs seek a declaratory judgment that the Fourteenth Amendment's equal protection clause and the Voting Rights Act of 1965 (42 U.S.C. §§ 1973, et seq.) invalidates § 24-252, Code of Virginia 1950, insofar as this section denies to any voter, solely because of his inability to write, the privilege of casting a secret ballot for a candidate whose name is not printed on the official ballot. The plaintiffs pray that the defendants be enjoined from refusing to count any vote because the candidate's name was inserted on the official ballot by means other than the voter's handwriting. We conclude that the relief sought by the plaintiffs should be denied.

Pertinent provisions of the Virginia Constitution are:

> "§ 27: *Method of Voting.*—All elections by the people shall be by ballot; * * *
>
> "The ballot box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed or counted, in secret.
>
> So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained."

"§ 28. *Ballots.*—The General Assembly shall provide for ballots without any distinguishing mark or symbol, for the use in all State, county, city and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candidates and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another."

Section 24-252, Code of Virginia 1950, provides:

"*Insertion of names on ballots.*—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

The propriety of stickers is a matter for legislative, not judicial determination. Arguments for and against their use abound. Stickers have been lauded for facilitating voting and denounced as conductive to fraud and confusion. Their use has been approved under statutes permitting write-ins. *Pace* v. *Hickey,* 236 Ark. 792, 370 S.W. 2d 66 (1963); *O'Brien* v. *Election Comm'rs.,* 257 Mass. 332, 153 N.E. 553 (1926); *Dewalt* v. *Bartley,* 146 Pa. 529, 24 Atl. 185 (1892); *State* v. *Anderson,* 191 Wisc. 538, 211 N.W. 938 (1927). Illinois forbade their use, *Fletcher* v. *Wall,* 172 Ill.

426, 50 N.E. 230 (1898), and the constitutionality of this ban has been upheld. *Blackman* v. *Stone,* 101 F.2d 500, 504 (7th Cir. 1939).

The plaintiffs' contention that § 24-252 violates the Fourteenth Amendment because it discriminates against illiterates is not supported by authority. To the contrary, exclusion of illiterate persons from voting, if no other discrimination is practiced, does not violate the Fourteenth Amendment.

In *Lassiter* v. *Northampton Election Bd.,* 360 U.S. 45, 51 (1959), the Court said:

> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record • • • are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. • • • It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. • • • North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards."

Lassiter warns that "• • • a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." 360 U.S. 53. No evidence has been presented that Virginia's prohibition of stickers has been administered in a discriminatory manner. It has not been used to disfranchise any class of citizens. We conclude that § 24-252 does not violate the Fourteenth Amendment by discriminating between literate and illiterate voters.

The equal protection clause of the Fourteenth Amendment and the Fifteenth Amendment are not the only standards by which state legislation governing the franchise must be measured. State laws affecting the right of suffrage must not contravene "• • • any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). The plaintiffs urge that requiring the name of the write-in candidate to be inserted in the voter's own handwriting violates the Voting Rights Act of 1965 (42 U.S.C. § 1973, et seq.). The constitutionality of pertinent sections of the Act is not in dispute. Cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

Virginia is subject to the Act, 42 U.S.C. § 1973b(b). Until the state is removed from the Act's provisions, all tests or devices for determining eligibility to vote are suspended. 42 U.S.C. § 1973b(a).

The plaintiffs rely on these sections of the Act:

> 42 U.S.C. § 1973b(a):
>
> "• • • no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State • • •."

42 U.S.C. § 1973b(c):

"The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

42 U.S.C. § 1973i(a):

"No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote."

Section 24-251, Code of Virginia 1950, authorizes a judge voters of election, upon request, to assist a physically handicapped voter prepare his ballot, and allows a blind voter to be aided by a person of his choice. The assistants are enjoined to secrecy. For any corrupt violation of their duties, they may be punished by confinement in jail for not less than one nor more than twelve months. No provision was made for helping an illiterate person because under Virginia law all voters had to demonstrate ability to read and write.

After the enactment of the Voting Rights Act of 1965, Virginia directed its registrars to help illiterate persons register. The Board of Elections recognized that illiterates might need assistance with their ballots. For this reason, it instructed all judges of election:

"On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 8, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code), shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

These instructions also apply to precincts in which voting machines are used."

The Attorney General of Virginia asserted, and the plaintiffs do not controvert, that these instructions apply while the Voting Rights Act of 1965 is effective in the state.

The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. § 1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. Under present Virginia statutes and regulations of the Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled.

Judgment will be entered for the defendants.

May 2, 1967

Judgment

For reasons stated in the opinion of the court this day filed;

It is ADJUDGED AND ORDERED that the prayer of the plaintiffs' complaint is denied, the complaint is dismissed, and the action is stricken from the docket with costs taxed against the plaintiffs.

United States Circiut Judge
/s/ JOHN D. BUTZNER, JR.

United States District Judge
/s/ ALBERT V. BRYAN

United States Circiut Judge
/s/ HARRISON L. WINTER

Plaintiffs' Notice of Appeal

I. Notice is hereby given that the plaintiffs Richard Allen, Lena W. Dunn, Washington Moore, McKinley Dunn, Nora Tyler, James Gilbert Tyler, Fannie M. Brown, Patrick N. Brown and James Donikens hereby appeal to the Supreme Court of the United States from the final order entered in this action on May 2, 1967 whereby prayers B (1) and (3) of the plaintiffs' complaint for a declaratory judgment and injunctive relief were denied and said complaint was dismissed.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Docket entries
2. Complaint and affidavits filed therewith
3. Notification and request for designation of three-judge court
4. Designation of three-judge court
5. Pre-trial order
6. Answer of State Board of Elections
7. Answer of Robert E. Garnett and J. F. Lipscomb
8. Answer of Thomas Brown
9. Answer of Paul Bell
10. Answer of Mark Grizzard, Benjamin Griffin and Forest Lankford
11. Request for Admissions

12. Response to Plaintiffs' Request for Admissions, filed by State Board of Elections
13. Response to Plaintiffs' Request for Admissions, filed by Robert E. Garnett and J. F. Lipscomb
14. Response to Plaintiffs' Request for Admissions, filed by Thomas Brown and Paul Bell
15. Response to Plaintiffs' Request for Admissions, filed by Mark Grizzard, Forest Lankford and Benjamin Griffin
16. Plaintiffs' Exhibit No. 1 (Sticker or Paster)
17. Plaintiffs' Exhibit No. 2 (Statement of the Vote)
18. Plaintiffs' Exhibit No. 3 (Table showing Disparities)
19. Defendants' Exhibit #1 (Letter to all registrars)
20. Defendants' Exhibit #2 (Memo to general registrars)
21. Defendants' Exhibit #3 (Letter to Secretaries of Electoral Boards)
22. Defendants' Exhibit #4 (Bulletin to all judges of elections)
23. Motion for Summary Judgment
24. Plaintiffs' Pre-trial Brief
25. Brief in Behalf of Defendants
26. Opinion of the Court
27. Judgment
28. This Notice of Appeal

Plaintiffs' Notice of Appeal

III. The following questions are presented by this appeal:

1.

Does the Fourteenth Amendment inhibit Virginia from denying to electors who cannot write the privilege of voting secretly for a person not named on the ballot, while extending such privilege to electors who can write?

2.

Does the Voting Rights Act of 1965 inhibit Virginia from denying to electors who cannot write the privilege of voting secretly for a person not named on the ballot, while extending such privilege to electors who can write?

/s/ S. W. TUCKER
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New York, New York 10019

Counsel for Plaintiffs

Motion to Enlarge Time for Filing Jurisdictional Statement

Plaintiffs move the Court to extend until September 28, 1967, the time within which plaintiffs may file their Jurisdictional Statement, on the grounds that such an extension will afford plaintiffs' attorneys adequate time to comprehensively present and develop the issues raised herein.

No previous extensions of time have been obtained from the adverse party or granted by this Court.

/s/ S. W. Tucker
Of Counsel For Plaintiffs

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Counsel for Plaintiffs

Order Granting Motion to Enlarge Time to File Jurisdictional Statement

Plaintiffs having moved the Court to extend until September 28, 1967, the time within which plaintiffs may file their Jurisdictional Statement, and it appearing to the Court that the motion is made for good cause, it is

ORDERED, that plaintiffs' time to file their Jurisdictional Statement in the above entitled cause be extended to and including the 28th day of September, 1967.

Let the Clerk send copies of this order to counsel of record.

.....

United States Circuit Judge

August 23, 1967

Order Extending Time for Docketing Appeal

It being represented unto the court that further time will be required by the clerk within which to prepare and file the appeal record in this action in the United States Supreme Court,

IT IS ORDERED that the time for docketing the appeal in this case in the aforesaid court be and the same hereby is, extended to and including the eighth day of September, 1967.

Let copies hereof be forwarded to counsel of record.

/s/ JOHN D. BUTZNER, JR.

United States District Judge Designate

Entry Nunc Pro tunc August 8, 1967,
August 24, 1967

Order of United States Supreme Court Postponing Jurisdiction

(Filed June 10, 1968)

No. 661, *Allen* v. *State Board of Elections*

Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. The case is placed on the summary calendar.

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APPENDIX

IN THE

Supreme Court of the United States

October Term, 1968

Number 25

J. C. FAIRLY, ET AL.

Appellants

versus

JOE T. PATTERSON, ET AL.,

Appellees

LEVI MARSHAW, III, ET AL.,

Appellants

versus

JOE T. PATTERSON, ET AL.,

Appellees

Lawrence Aschenbrenner
Martha M. Wootl
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Appellants

No. 1201-Civil Docket Entries

7-14-67 COMPLAINT, original and twelve (12) copies filed.

8-10-67 Defendants Answer to Complaint, with Certificate of Service filed, in Quadruplicate.

9-15-67 Motion for Substitution of Parties and dropping and adding Parties, for Dismissal of certain claims for relief, and for Default Judgment - filed.

9-28-67 Order amending order heretofore entered in this cause on September 25, 1967 adding Alma D. Maddox as a party-defendant and dismissing the complaint as to defendant Paul Keller; adding Majorie Baroni as a party-plaintiff and adding Mamie L. Mazique as a party-plaintiff and dismissing Plaintiffs' second claim without prejudice, filed and entered OB 1967 pages 215 and 216.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
VICKSBURG DIVISION

CIVIL ACTION
NO. 1201

LEVI MARSAW, III, MARJORIE BARONI, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

JOE T. PATTERSON, Attorney General of the State of Mississippi; ARLIE C. WARREN, BOYD SOJOURNER, JAMES H. CARTER, J. W. BROWN, SR. and F. L. CALLON, as members of the Board of Supervisors of Adams County, ROBERT V. WOLCOTT, JAMES T. O'NEILL and ALMA D. MADDOX as County Election Commissioners for Adams County,

Defendants

COMPLAINT

1. This action arises under the Voting Rights Act of 1965 (42 U.S.C. § 1973), the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1971. It seeks a declaratory judgment that § 2870 of the Mississippi Code, as amended, is violative of said Voting Rights Act, Fourteenth and Fifteenth Amendments to the Constitution of the United States, and 42 U.S.C. § 1971, and preliminary and permanent injunctions against the application and enforcement of said

§ 2870 by the Board of Supervisors of Adams County, Mississippi, and against the election of members of the Adams County Board of Supervisors pursuant to or in accordance with the provisions of § 2870 or any order of the Adams County Board of Supervisors providing for the election of Supervisors-at-large.

2. Jurisdiction is conferred on this Court by Title 28 U.S.C. § § 1343(3) and (4), 2201 and 2202, and by U.S.C. § § 1971(d) and 1973(j) (f). A district court of three judges is required to be convened by Title 28 U.S.C. 2281 and Title 42 U.S.C. § 1973c.

3. Plaintiffs are all adult Negro citizens of Mississippi and of the United States, and are citizens, residents and qualifield electors of Adams County, Mississippi.

4. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated as qualified electors of Adams County and as potential candidates for Board of Supervisors of Adams County, pursuant to Rule 23 of the Federal Rules of Civil Procedure. As to the classes: (1) they are so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the classes; (3) the claims of the plaintiffs are typical of the claims of the classes; (4) plaintiffs will fairly and adequately protect the interests of the classes; and (5) defendants have acted and will act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the classes as a whole.

5. Defendant Joe T. Patterson is Attorney General of the State of Mississippi.

6. (a) Defendants Warren, Sojourner, Carter, Brown, and Callon are members of the Board of Supervisors of Adams County and, as such, constitute the primary governing body of Adams County, being responsible for county roads and bridges, some taxation, health services, welfare, resource development, and for spending the county's money, pursuant to § 2870 *et seq.* of the Mississippi Code.

(b) Defendants Wolcott, O'Neill and Keller are the County Election Commissioners for Adams County and, as such, supervise and administer all general elections in Adams County pursuant to Sections 3204 *et seq.* of the Mississippi Code.

FIRST CLAIM FOR RELIEF

7. Each county in Mississippi, including Adams County, is composed of five (5) districts, and each county is governed in certain respects by a Board of Supervisors composed of five (5) members. Prior to and on November 1, 1964, and up until the date referred to in paragraph eight (8) hereof, each of the members of the Board of Supervisors in each of the counties in Mississippi, including Adams County, were elected only by the qualified electors of one particular district, pursuant to Section 2870 of the Mississippi Code.

8. Effective May 27, 1966, the Legislature of Mississippi, with the approval of Governor Paul B. Johnson, amended the aforesaid Section 2870 to provide that members of the county boards of supervisors could, at

each county's option, be elected at large, i.e., all the qualified electors of the county would be eligible to vote for each member of the board of supervisors, rather than by the means in force and effect on November 1, 1964, as described in paragraph seven (7) hereof. Specifically, such amendment was as follows:*

§ 2870. Districts and boundaries.

Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors,but the districts as now existing shall continue until change. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

---

* Material crossed out was deleted, and material underlined was added.

The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and/or more than fifty per cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next general election wherein said supervisors are elected.

If twenty per cent (20%) of the qualified

electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district then thereafter all elections for members of boards of supervisors shall be so held. If not, members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of the boards of supervisors again until two (2) years have transpired.

This act shall not be construed to effect any supervisor now holding office until the expiration of his present term of office."

9. On October 19, 1966, defendants Warren, Sojourner, Carter, Brown and Callon, acting in their official capacities as members of the Board of Supervisors of Adams County, adopted an order, pursuant to the authority granted to them by Section 2870 of the Mississippi Code, as amended, providing that members of the Board of Supervisors in Adams County be elected at large in all future elections.

10. The Voting Rights Act of 1965 (42 U.S.C.§ 1973) is applicable to the State of Mississippi. That Act provides in Section 5 that whenever a State, or political subdivision thereof:

> "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964"

the State or subdivision cannot enforce such new qualification prerequisite, standard, practice or procedure unless and until it either:

(a) institutes an action in the United States District Court for the District of Columbia, and said court enters a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color; or

(b) submits such qualification, prerequisite, standard, practice, or procedure to the Attorney General of the United States and the Attorney General does not interpose an objection within 60 days after such submission.

11. The amendment to Section 2870 as described in paragraph eight (8) hereof is such a change in qualification, prerequisite, standard, practice, or procedure as is referred to in Section 5 of the Voting Rights Act of 1965.

12. Neither the State of Mississippi, nor any of its officials, nor Adams County, Mississippi, nor any of its officials has:

(a) instituted any action in the United States District Court for the District of Columbia for a declaratory judgment that Section 2870 of the Mississippi Code, as amended, or the action of the Adams County Board of Supervisors in applying such section as amended, does not have the purpose of and will not have the effect of, denying or abridging the right to vote on account of race or color, nor

(b) submitted said amended section of the Code or said action of the Adams County Board of Supervisors to the Attorney General of the United States for his approval. Inasmuch as the enactment of the amendment to Section 2870 of the Mississippi Code by the State of Mississippi and the action taken by the Adams County Board of Supervisors pursuant to that amendment are both in violation of the requirements of § 5 of the Voting Rights Act of 1965, said enactment and action are void

and of no legal force or effect. Plaintiffs have no adequate remedy at law and unless the relief requested herein is granted, plaintiffs will suffer irreparable harm in that their rights and the rights of the classes they represent to vote and run for public office will be denied and abridged in violation of Title 42 U.S.C. § 1973.

SECOND CLAIM FOR RELIEF

13. Plaintiffs reaver each and every averment contained in paragraphs 7 through 9 hereof.

14. The amendments to §2870 of the Mississippi Code, as described in paragraph 8 hereof and the action taken pursuant thereto by the Board of Supervisors of Adams County, as aforesaid, has the purpose and effect of:

(a) denying or abridging, on account of race or color, the votes of the individual plaintiffs and the classes they represent;

(b) preventing the election of Negro candidates to county boards of supervisors by allowing the members of the county boards of supervisors to be elected at large in counties, such as Adams County, in which there is a county-wide white voting majority, but in which there is a Negro majority in one or more individual supervisor's district; and

(c) deterring potential Negro candidates from running for the office of County Supervisor in counties,

such as Adams County, which have a county-wide white voting majority, but in which there is a Negro voting majority in one or more individual supervisor's district, and which counties have opted for an at-large election under § 2870, as amended, thereby denying or abridging, on account of race or color, the right of such persons to participate in Government as elected office-holders.

15. For the reasons stated in paragraph 14 above, § 2870 of the Mississippi Code, as amended, and the action taken pursuant thereto by the Board of Supervisors of Adams County, as aforesaid, violate the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1971 and 1973.

WHEREFORE, plaintiffs pray that:

1. Pursuant to the provisions of 28 U.S.C.§§ 2281 and 2283 and 42 U.S.C. § 1973c, a district court of three judges be convened.

2. This Court declare that § 2870 of the Mississippi Code, as amended, and also as applied in Adams County, is in violation of the Voting Rights Act of 1965 (Title 42 U.S.C. § 1973), the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1971, and therefore void.

3. This Court issue preliminary and permanent injunctions enjoining defendants, their agents, employees, successors and all persons in active concert and

participation with them from enforcing, implementing or otherwise giving effect to § 2870 of the Mississippi Code, as amended, in any way whatsoever, including, but not limited to the holding of the election at large of members of the Board of Supervisors of Adams County.

4. This Court enjoin the election of members of the Board of Supervisors of Adams County unless and until candidates for that office may be and are elected by districts pursuant to § 2870 prior to its amendment as aforesaid, or until Section 5 of the Voting Rights Act of 1965 is complied with by defendants.

5. This Court order the defendants, their agents, employees, successors and all persons in active concert and participation with them to hold election for the Adams County Board of Supervisors on November 7, 1967, by districts and not at large.

6. This Court retain jurisdiction of this cause.

7. This Court grant plaintiffs such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

Dated: July 11, 1967.

Respectfully submitted,

s/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
VICKSBURG DIVISION
CIVIL ACTION
NO. 1201

LEVI MARSAW, III, MARJORIE BARONI, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

PLAINTIFFS

V.

JOE T. PATTERSON, ATTORNEY GENERAL OF THE STATE OF MISSISSIPP ; ARLIE C. WARREN, BOYD SOJOURNER, JAMES H. CARTER, J. W. BROWN, and F. L. CALLON, AS MEMBERS OF THE BOARD OF SUPERVISORS OF ADAMS COUNTY, ROBERT V. WOLCOTT, JAMES T. O'NEILL AND PAUL KELLER, AS COUNTY ELECTION COMMISSIONERS FOR ADAMS COUNTY,

DEFENDANTS

(Filed: Aug. 8, 1967)

ANSWER

FIRST DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction of the subject matter and parties to this cause of action.

THIRD DEFENSE

Answer to First Claim for Relief.

1. Defendants deny the allegations contained in Paragraph 2 of the Complaint.

2. Defendants deny the allegations contained in Paragraph 2 of the Complaint.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint except the allegation that Plaintiffs are all members of the Negro race, which allegation Defendants deny and aver that Plaintiff Majorie Baroni is a member of the White race.

4. Defendants deny the allegations contained in Paragraph 4 of the Complaint and aver that this is not a class action, but only an action brought on behalf of the two named Plaintiffs.

5. Defendants admit the allegations contained in Paragraph 5 of the Complaint.

6. Defendants admit the allegations contained in Paragraph 6(a) and (b) of the Complaint.

7. Defendants admit the allegations contained in Paragraph 7 of the Complaint.

8. Defendants deny the allegations contained in Paragraph 8 of the Complaint, but aver that the Legislature of Mississippi, with the approval of Governor Paul B. Johnson, amended Section 2870 of the Mississippi Code and state that said amendment is the best source as to its contents.

9. Defendants admit the allegation contained in Paragraph 9 of the Complaint.

10. Defendants deny the allegations contained in Paragraph 10 and subparagraphs (a) and (b) thereof and aver that the Voting Rights Act of 1965 is the best source of its contents.

11. Defendants deny the allegation contained in Paragraph 11 of the Complaint and aver that the action taken by the Members of the Board of Supervisors of Adams County, Mississippi, complained of in the Complaint is not a change in qualification, prerequisite, standard, practice, or procedure as is referred to in Section 5 of the Voting Rights Act of 1965.

12. Defendants deny the allegations contained in Paragraph 12 and subparagraphs (a) and (b) thereof, but admit that the action taken by the said Board of Supervisors under and by virtue of Section 2870 as amended has never been submitted to the United States District Court for the District of Columbia, nor submitted to the Attorney General of the United States for his approval, but affirmatively state that said Board was under no duty by Section 5 of the Voting Rights Act of 1965 or any other law to make such submissions.

Answer to Second Claim

13. Defendants in answer to Paragraph 13 of the Complaint adopt and reaver their answers to Paragraphs 7 through 9 of the Complaint.

14. Defendants deny the allegations contained in Paragraph 14 and subparagraphs (a), (b) and (c) thereof of the Complaint.

15. Defendants deny the allegation contained in Paragraph 15 of the Complaint.

WHEREFORE, Defendants deny that Plaintiffs or any of them are entitled to the relief prayed for or to any other relief in this cause of action; therefore pray that this Court dismiss the Complaint.

B. C. CALLON
ATTORNEY AT LAW
P. O. BOX 1315
NATCHEZ, MISSISSIPPI

JOE T. PATTERSON,
ATTORNEY GENERAL
OF THE STATE OF MISSISSIPPI

WILLIAM A. ALLAIN
ASSISTANT ATTORNEY GENERAL
OF THE STATE OF MISSISSIPPI

BY: S/William A.Allain
WILLIAM A. ALLAIN

CERTIFICATE OF SERVICE

I, WILLIAM A. ALLAIN, Assistant Attorney General of the State of Mississippi, do hereby certify that I have this day mailed by United States Mail, postage prepaid, one true and correct copy of the foregoing Answer to Honorable L. Lackey Rowe, Jr., 233 North Farish Street, Jackson, Mississippi.

THIS 7th day of August, 1967.

S/ William A. Allain
WILLIAM A. ALLAIN

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 4148J

JOE T. PATTERSON, et al.
Defendants.

SETH BALLARD, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1200 W

JOE T. PATTERSON, et al.,
Defendants.

J.C. FAIRLEY, et al.
Plaintiff,

vs.

CIVIL ACTION
No. 2205 H

JOE T. PATTERSON, et al.
Defendants.

LEVI MARSAW, III, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1201 W

JOE T. PATTERSON, et al.
Defendants.

CHARLES E. BUNTON, et al.
Plaintiffs,

vs. CIVIL ACTION
No.1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed: Sept. 15, 1967)

MOTION FOR SUBSTITUTION OF PARTIES AND DROPPING AND ADDING PARTIES, FOR DISMISSAL OF CERTAIN CLAIMS FOR RELIEF, AND FOR DEFAULT JUDGMENT

Plaintiffs in each of the above styled actions, by their attorneys, respectfully move this Court:

1. In Civil Action No. 4148 J:

(a) To substitute Ed William Moses as a party defendant in lieu of defendant Mrs. Mabel D. Henrich, on the ground that Mrs. Mabel D. Henrich is no longer a Holmes County Election Commissioner and Ed William Moses has been appointed as Election Commissioner in her place.

(b) To dismiss plaintiffs' second for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

(c) For a default judgment against Joe T.

Patterson, Attorney General of the State of Mississippi, on the ground that he has neither appeared nor answered within the time set for doing so by Rule 12(a) of the Federal Rules of Civil Procedure.

2. In Civil Action No. 1200 W:

(a) To substitute Robert Lee Williams as a party defendant in lieu of defendant Iler K. Ellis, on the ground that Iler K. Ellis is no longer a member of the Jefferson County Board of Education and Robert Lee Williams has assumed his place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

3. In Civil Action No. 2205 H:

(a) To substitute Mrs. Fred Blackwell as a party defendant in lieu of defendant Mrs. Mary E. Pon, on the ground that Mrs. Mary E. Pon is no longer a Forrest County Election Commissioner and Mrs. Fred Blackwell has assumed her place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

4. In Civil Action No. 1201 W:

(a) To substitute Alma D. Maddox as a party defendant in lieu of defendant Paul Keller, on the ground that Paul Keller is deceased and his place as an Adams County Election Commissioner has been assumed by Alma D. Maddox.

(b) To drop the plaintiff Majorie Baroni and add in her place as a named plaintiff, Mami L. Mazique, on the ground that Majorie Baroni is a member of the Caucasian race and Mamie L. Mazique is a member of the Negro race and desires to join in this suit.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do no wish to pursue said claim for relief.

5. In Civil Action No. 1204 W:

(a) To substitute Ethan Porter as a party defendant in lieu of defendant William Smith, on the ground that William Smith is no longer a member of the Board of Education of Claiborne County, and Ethan Porter has assumed his place.

(b) To substitute Orin R. Segrest, Jr. as a party defendant in lieu of defendant Robert Vaughn, on the ground that Robert Vaughn is no longer an Election Commissioner for Claiborne County and Orin R. Segrest, Jr., has assumed his place.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to

pursue said claim for relief.

Dated: September 14, 1967

Respectfully submitted,

S/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

To:

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Will S. Wells, Esq.
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Gray & Montague
201-05 Carter Building
P. O. Box 1288
Hattiesburg, Mississippi

J. T. Drake, Esq.
P. O. Box 366
Port Gibson, Mississippi

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and for Default Judgment is noticed for hearing on September 25, 1967, at 9:00 A.M., or as soon thereafter as counsel can be heard, before the Honorable Dan M. Russell, Jr., United States District Judge, in the United States Courthouse in Jackson, Mississippi.

Dated: September 14, 1967.

Respectfully submitted,

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and For Default Judgment and a copy of the foregoing Notice of Motion have been mailed this date, postage prepaid, to Joe T. Patterson, Esq., Will S. Wells, Esq., William A. Allain, Esq., Office of the Attorney General, New Capitol Building, Jackson Mississippi; Corban & Corban, Robert L. Corban, Esq., Fayette, Mississippi; B. C. Callon, Esq., P. O. Box 1315, Natchez, Mississippi; Calvin R. King, Esq., P. O. Drawer 392, Durant, Mississippi; R. A. Gray, Jr., Esq., Gray & Montague, 201-05 Carter Building, P. O. Box 1288, Hattiesburg, Mississippi and J. T. Drake, Esq., P. O. Box 366, Port Gibson, Mississippi.

Dated: September 14, 1967

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs. CIVIL ACTION
No. 4148J

JOE T. PATTERSON, et al.
Defendants.

SETH BALLARD, et al.
Plaintiffs,

vs. CIVIL ACTION
No. 1200 W

JOE T. PATTERSON, et al.,
Defendants.

J.C. FAIRLEY, et al.
Plaintiff,

vs. CIVIL ACTION
No. 2205 H

JOE T. PATTERSON, et al.
Defendants.

LEVI MARSAW, III, et al.
Plaintiffs,

vs. CIVIL ACTION
No. 1201 W

JOE T. PATTERSON, et al.
Defendants.

CHARLES E. BUNTON, et al.
Plaintiffs,

vs. CIVIL ACTION
No. 1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed: Sept. 28, 1967)

ORDER

It appearing that the Order entered on September 25, 1967, in Civil Action Number 2205H and 1201W should be clarified to make plain the intention of the Court,

IT IS ORDERED, that the same be and they are hereby amended to read as follows:

In Civil Action No. 2205H, Mrs. Fred Blackwell is, hereby, added as a party-defendant; The Complaint is dismissed as to the defendant Mrs. Mary E. Pon; That Plaintiffs' second claim for relief be, and the same is, hereby dismissed without prejudice.

In Civil Action No. 1201W, Alma D. Maddox is, hereby, added as a party-defendant; The Complaint is

dismissed as to the Defendant Paul Keller; Plaintiff Marjorie Baroni is, hereby, dropped as a party-plaintiff and Mamie L. Mazique is added as a party-plaintiff; Plaintiffs' second claim is, hereby, dismissed without prejudice.

ORDERED, this the 28th day of September, 1967.

s/ Dan M. Russell, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

LEVI MARSAW, III, ET AL PLAINFIFFS

VS. CIVIL ACTION NO. 1201 W

JOE T. PATTERSON, ET AL DEFENDANTS

(Filed Oct. 8, 1967)

ORDER

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether or not Section 2870 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 2870, as amended by the legislature of Mississippi at its regular session of 1966, does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C., and that plaintiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in this action be, and the

same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 4th day of October, 1967.

s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

Acting For and on Behalf of The Court

A TRUE COPY, I HEREBY CERTIFY.
ROBERT C. THOMAS, CLERK
By: S/ Ruby L. Short
Deputy Clerk
Dated: 10/8/67

No. 2205-Civil Docket Entries

7-18-67 Complaint with copies, filed.

8-17-67 Joint answer of defendants, as members of the Board of Supervisors, Forrest County, Mississippi., with certificate of service, filed.

8-17-67 Separate answer of Defendant Joe T. Patterson with certificate of service, filed.

9-15-67 Motion for substitution of parties and dropping and adding parties, for dismissal of certain claims for relief, and for default judgment, filed.

9-27-67 Joiner of defendant members of Board of Supervisors and County Election Commissioners in Motion of Defendant Attorney General of the State of Mississippi for Summary Judgment with Certificate of Mailing, filed.

9-28-67 Order that Order entered on 9-25-67 be amended to read: Mrs. Fred Blackwell added as party-defendant, complaint dismissed as to Mrs. Mary E. Pon, plaintiffs' second claim dismissed without prejudice, filed. O. B. 1967, Page 348 - 349.

10-10-67 Order that the injunction prayed for is denied and the complaint is dismissed at the costs of the plaintiffs, order signed on 10-4-67 by Judge Russell, Acting for and on behalf of the Court, filed. O. B. 1967, Page 356-357.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

J. C. FAIRLEY, ALVIN WILLIAMS, JAMES FLUKER, REV. WALTER L. RUSSELL, JAMES BONNE, and STEPHEN LEE GRADY, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs

CIVIL ACTION
No. 2205

JOE T. PATTERSON, Attorney General of the State of Mississippi; M. V. SIGLER, ALBERT S. WOODS, JR., SELBY C. BOWLING, J. A. P. CARTER, JR. and HERBERT H. LEE, as members of the Board of Supervisors of Forrest County; MRS. D. O. SEGREST, FRED BLACKWELL, and G. C. SIMMONS, as County Election Commissioners for Forrest County,

Defendants.

(Filed Jul. 18, 1967)

COMPLAINT

1. This action arises under the Voting Rights Act of 1965 (42 U.S.C. § 1973), the Fourteenth and Fifteenth Amendments to The Constitution of the United States. It seeks a declaratory judgment that § 2870 of the Mississippi Code, as amended, is violative of said Voting Rights Act, Fourteenth And Fifteenth Amendments and preliminary and permanent injunctions against the application and enforcement of said § 2870 by the Board of Supervisors of Forrest County, Mississippi, and against the election of members of the Forrest County Board of Supervisors pursuant to or in accordance with the

provisions of § 2870 or any order of the Forrest County Board of Supervisors providing for the, election of Supervisors-at-large.

2. Jurisdiction is conferred on this Court by Title 28 U.S.C. §§ 1343(3) and (4), 2201 and 2202, and by U.S.C. §§ 1971(d) and 1973(j) (f). A district court of three judges is required to be convened by Title 28 U.S.C. § 2281 and Title 42 U.S.C. § 1973c.

3. Plaintiffs are all adult Negro citizens of Mississippi and of the United States, and are citizens, residents and qualified electors of Forrest County, Mississippi.

4. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated as qualified electors of Forrest County and as potential candidates for Board of Supervisors of Forrest County, pursuant to Rule 23 of the Federal Rules of Civil Procedure. As to the classes: (1) they are so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the classes; (3) the claims of the plaintiffs are typical of the claims of the classes; (4) plaintiffs will fairly and adequately protect the interests of the classes; and (5) defendants have acted and will act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the classes as a whole.

5. Defendant Joe T. Patterson is Attorney General of the State of Mississippi.

6. (a) Defendants, Sigler, Woods, Bowling, Carter and Lee are members of the Board of Supervisors of Forrest County and, as such, constitute the primary governing body of Forrest County, being responsible for county roads and bridges, some taxation, health services, welfare, resource development, and for spending the county's money, pursuant to § 2870 *et seq.* of the Mississippi Code.

(b) Defendants Segrest, Pon Simmons are the County Election Commissioners for Forrest County and, as such, supervise and administer all general elections in Forrest County pursuant to Sections 3204 *et seq.* of the Mississippi Code.

FIRST CLAIM FOR RELIEF

7. Each county in Mississippi, including Forrest County, is compose of five (5) districts, and each county is governed in certain respects by a Board of Supervisors composed of five (5) members. Prior to and on November 1, 1964, and up until the date referred to in paragraph eight (8) hereof, each of the members of the Board of Supervisors in each of the counties in Mississippi, includingForrest County, were elected only by the qualified electors of one particular district, pursuant to Section 2870 of the Mississippi Code.

8. Effective May 27, 1966, the Legislature of Mississippi, with the approval of Governor Paul B. Johnson, amended the aforesaid Section 2870 to provide that members of the county boards of supervisors could, at

each county's option, be elected at large, i.e., all the qualified electors of the county would be eligible to vote for each member of the board of supervisors, rather than by the means in force and effect on November 1, 1964, as described in paragraph seven (7) hereof. Specifically, such amendment was as follows:*

§ 2870. Districts and boundaries.

Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors,but the districts as now existing shall continue until change. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than

*Material crossed out was deleted, and material underlined was added.

thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and/or more than fifty per cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next election wherein said supervisors are elected.

If twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after

publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district then thereafter all elections for members of boards of supervisors shall be so held. If not, members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of the boards of supervisors again until two (2) years have transpired.

This act shall not be construed to effect any supervisor now holding office until the expiration of his present term of office."

9. On November 29, 1966, defendants Sigler, Woods, Bowling, Carter and Lee, acting in their official capacities as members of the Board of Supervisors of Forrest County, adopted an order, pursuantto the authority granted to them by Section 2870 of the Mississippi Code, as amended, providing that members of the Board of Supervisors in Forrest County be elected at large in all future elections.

10. The Voting Rights Act of 1965 (42 U.S.C.§ 1973) is applicable to the State of Mississippi. That Act provides in Section 5 that whenever a State, or political subdivision thereof:

> "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964"

the State or subdivision cannot enforce such new qualification prerequisite, standard, practice or procedure unless and until it either:

(a) institutes an action in the United States District Court for the District of Columbia, and said court enters a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color; or

(b) submits such qualification, prerequisite, standard, practice, or procedure to the Attorney General of the United States and the Attorney General does not interpose an objection within 60 days after such submission.

11. The amendment to Section 2870 as described in paragraph eight (8) hereof is such a change in qualification, prerequisite, standard, practice, or procedure as is referred to in Section 5 of the Voting Rights Act of 1965.

12. Neither the State of Mississippi, nor any of its officials, nor Forrest County, Mississippi, nor any of its officials has:

(a) instituted any action in the United States District Court for the District of Columbia for a declaratory judgment that Section 2870 of the Mississippi Code, as amended, or the action of the Forrest County Board of Supervisors in applying such section as amended, does not have the purpose of and will not have the effect of, denying or abridging the right to vote on account of race or color, nor

(b) submitted said amended section of the Code or said action of the Forrest County Board of Supervisors to the Attorney General of the United States for his approval. Inasmuch as the enactment of the amendment to Section 2870 of the Mississippi Code by the State of Mississippi and the action taken by the Forrest County Board of Supervisors pursuant to that amendment are both in violation ofthe requirements of Section 5 of the Voting Rights Act of 1965, said enactment and action are void and of no legal force or effect. Plaintiffs have no adequate remedy at law and unless the relief requested herein is granted, plaintiffs will suffer irreparable harm in that their rights and the rights of the classes they represent to vote and run for public office will be denied and abridged in violation of Title 42 U.S.C. § 1973.

SECOND CLAIM FOR RELIEF

13. Plaintiffs reaver each and every averment contained in paragraphs 7 through 9 hereof.

14. The amendments to Section 2870 of the Mississippi Code, as described in paragraph 8 hereof and the action taken pursuant thereto by the Board of Supervisors of Forrest County, as aforesaid, has the purpose and effect of:

(a) denying or abridging, on account of race or color, the votes of the individual plaintiffs and the classes they represent;

(b) preventing the election of Negro candidates to county boards of supervisors by allowing the members of the county boards of supervisors to be elected at large in counties, such as ForrestCounty, in which there is a county-wide white voting majority, but in which there is a Negro majority in one or more individual supervisor's district; and

(c) deterring potential Negro candidates from running for the office of County Supervisor in counties, such as Adams County, which have a county-wide white voting majority, but in which there is a Negro voting majority in one or more individual supervisor's district, and which counties have opted for an at-large election under Section 2870, as amended, thereby denying or abridging, on account of race or color, the right of such persons to participate in Government as elected

office-holders.

15. For the reasons stated in paragraph 14 above, Section 2870 of the Mississippi Code, as amended, and the action taken pursuant thereto by the Board of Supervisors of Forrest County, as aforesaid, violate the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § § 1971 and 1973.

WHEREFORE, plaintiffs pray that:

1. Pursuant to the provisions of 28 U.S.C. § 2281 and 2283 and 42 U.S.C. § 1973c, a district court of three judges be convened.

2. This Court declare that Section 2870 of the Mississippi Code, as amended, and also as applied in Forrest County, is in violation of the Voting Rights Act of 1965 (Title 42 U.S.C. § 1973), the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1971, and therefore void.

3. This Court issue preliminary and permanent injunctions enjoining defendants, their agents, employees, successors and all persons in active concert and participation with them from enforcing, implementing or otherwise giving effect to Section 2870 of the Mississippi Code, as amended, in any way whatsoever, including, but not limited to the holding of the election at large of members of the Board of Supervisors of Forrest County.

4. This Court enjoin the election of members of the Board of Supervisors of Forrest County unless and until

candidates for that office may be and are elected by districts pursuant to Section 2870 prior to its amendment as aforesaid, or until Section 5 of the Voting Rights Act of 1965 is complied with by defendants.

5. This Court order the defendants, their agents, employees, successors and all persons in active concert and participation with them to hold election for the Forrest County Board of Supervisors on November 7, 1967, by districts and not at large.

6. This Court retain jurisdiction of this cause.

7. This Court grant plaintiffs such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

Dated: July 12, 1967.

Respectfully submitted,

s/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

J. C. FAIRLEY, ALVIN WILLIAMS, JAMES FLUKER, REV. WALTER L. RUSSELL, JAMES BONNE, and STEPHEN LEE GRADY, on behalf of themselves and other persons similarly situated,

PLAINTIFFS

VS.

CIVIL ACTION
No. 2205

JOE T. PATTERSON, Attorney General of the State of Mississippi; W. V. SIGLER ALBERT S. WOODS, JR., SELBY C. BOWLING, J. A. P. CARTER, JR., and HERBERT H. LEE, as members of the Board of Supervisors of Forrest County; MRS. D. O. SEGREST, MRS. MARY E. PON, and G. C. SIMMONS, as County Election Commissioners for Forrest County,

DEFENDANTS

JOINT ANSWER OF DEFENDANTS, SIGLER, WOODS, BOWLING, CARTER, AND LEE, IN THE RESPECTIVE CAPACITY OF EACH AS A MEMBER OF THE BOARD OF SUPERVISORS OF FORREST COUNTY, MISSISSIPPI FORREST COUNTY, MISSISSIPPI

COME NOW the Defendants, W. U. SIGLER (erroneously identified in the case style of this Civil Action as "W.V. Sigler"), ALBERT S. WOODS, JR., SELBY C. BOWLING, J.A.P. CARTER, JR. andHERBERT H. LEE, in their respective representative capacities as the duly elected, fully qualified and presently acting members of the Board of Supervisors of Forrest County, Mississippi, by and through their attorney of record hereinto duly and fullyauthorized and empowered, and for joint answer to the Complaint exhibited against them in the above Civil Action respectfully say:

FIRST DEFENSE

FOR THIS, their First Defense, without waiving any other defense herein elsewhere asserted, these Defendants jointly say:

1. These Defendants say that the Complaint does notstate, and wholly fails to state, a claim or cause of action against these Defendants, or either of them, upon which relief can be granted or which is sufficient in law therefor, and that, for said reason, said Complaint should be dismissed and the relief therein sought should be denied.

SECOND DEFENSE

AND FOR THIS, their Second Defense, without waiving any other defense herein elsewhere asserted, further answering, these Defendants jointly say:

1. Answering the allegations contained in Paragraph numbered 1 of the Complaint, these Defendants deny that either the Voting Rights Act of 1965 (Title 42, U.S.C., Sec. 1973) or the Fourteenth or Fifteenth Amendments to the Constitution of the United States give rise to any cause or causes of action as sought to be propounded by the Plaintiffs or to any relief as claimed by them. While admitting that this Civil Action seeks the relief as delineated in said Paragraph numbered 1 of the Complaint, these Defendants deny that the Plaintiffs are entitled to any of such relief so sought or any relief whatsoever in the premises.

2. These Defendants deny the allegations contained in Paragraphs numbered 2, 3 and 4 of the Complaint.

3. These Defendants admit Paragraph numbered 5 of the Complaint.

4. Answering the allegations contained in Paragraph numbered 6 of the Complaint and sub-Paragraphs (a) and (b) thereof, these Defendants admit that they are the duly elected, fully qualified and presently acting members of the Board of Supervisors of Forrest County, Mississippi, and say that as such public officials their duties and

responsibilities are prescribed and fixed by applicable statutes of the State of Mississippi and that in all respects said statutes speak for themselves, and these Defendants deny that the Defendant, Pon, is a County Election Commissioner of Forrest County, Mississippi as alleged in said Paragraph 6(b).

5. Answering the allegations contained in Paragraph numbered 7 of the Complaint, these Defendants admit the same as applied to Forrest County, Mississippi, except that these Defendants say that, for the reasons set forth in next succeeding Paragraph 6 of this Answer, the phrase "... and up until a date referred to in paragraph eight (8) hereof, ..." is incomplete and, hence, inaccurate.

6. These Defendants admit the allegations contained in Paragraph numbered 8 of the Complaint, except that these Defendants say that the Order of November 29, 1966 therein referred to constitutes only a part of the proceedings of said Defendants, acting in their official capacities as members of the Board of Supervisors of Forrest County, Mississippi, with respect to the matters averred; and said Defendants attach hereto duly certified copies of said proceedings in their entirety, the same being made parts hereof for all purposes as if set forth as length herein, and identified as follows, to-wit:

(a) Order of the Board of Supervisors of Forrest County, Mississippi Providing that all Qualified Electors of Forrest County, Mississippi shall henceforth be Eligible to Vote for Each Member of the Board of Supervisors of Forrest County,

Mississippi, with Each Candidate being a Resident of the Supervisors District which he Proposes to Represent ; dated September 13, 1966, EXHIBIT "A" hereto.

(b) Order Spreading upon Minutes Proof of Publication of Former Order Providing that all Qualified Electors of Forrest County, Mississippi shall be Eligible to Vote for Each Member of the Board of Supervisors of Forrest County, Mississippi, with Each Candidate being a Resident of the Supervisors District which he Proposes to Represent - dated October 3, 1966, EXHIBIT "B" hereto.

(c) Order Finally Adjudicating that All Qualified Electors of Forrest County, Mississippi shall be Eligible to Vote for Each Member of the Board of Supervisors of Forrest County, Mississippi, with Each Candidate being a Resident of the Supervisors District which he Proposes to Represent - dated November 29,1966, EXHIBIT "C" hereto.

7. Answering the allegations contained in Paragraph numbered 10 of the Complaint, while admitting that the Voting Rights Act of 1965 (Title 42 U.S.C., Sec. 1973) is applicable to the State of Mississippi, these Defendants deny the applicability of said Act to this Civil Action and the relief herein sought, and these Defendants say that said Act speaks for itself as to each and all of the terms and

provisions thereof as therein contained and set forth, and, for purposes of this Answer, these Defendants deny the allegations of said Paragraph numbered 10 paraphrasing provisions of said Act and the conclusions of the pleader with respect thereto.

8. These Defendants deny the allegations contained in Paragraph numbered 11 of the Complaint.

9. Answering the allegations contained in Paragraph numbered 12 of the Complaint and sub-Paragraphs (a) and (b) thereof, while admitting that Forrest County, Mississippi or its officials have neither (a) instituted any action in the United States District Court for the District of Columbia nor (b) made any submittal to the Attorney General of the United States, these Defendants say that there was and is no legal requirement or necessity so to do in the premises, and these Defendants deny, each and all, the remaining allegations of said Paragraph numbered 12 and said sub-Paragraphs (a) and (b) thereof.

10. Answering the allegations of Paragraph numbered 13 of the Complaint, these Defendants reaver each and every admission and denial herein contained responsive to Paragraphs numbered 7 through 9 of said Complaint.

11. These Defendants deny, each and all, the allegations contained in Paragraph numbered 14 of the Complaint and sub-Paragraphs (a), (b) and (c) thereof.

12. These Defendants deny the allegations contained in Paragraph numbered 15 of the Complaint.

WHEREFORE, these Defendants respectfully say that the Plaintiffs are not entitled to any of the relief claimed and sought by said Complaint, and, particularly, that delineated in Paragraphs numbered 1 through 7, both inclusive, of the Prayer of the Complaint; and further, these Defendants say that said Complaint should be, as to them, each and all, finally dismissed, and that they, each and all, should be discharged with their reasonable costs.

W. U. SIGLER, ALBERT S. WOODS, JR., SELBY C. BOWLING, J. A. P. CARTER, JR. and HERBERT H. LEE, as Members of the Board of Supervisors of Forrest County, Mississippi, Defendants

By: S/ R. A. Gray, Jr.
R.A. Gray, Jr., Attorney of Record for said Defendants

R.A. GRAY, JR.
Gray and Montague
Attorneys at Law
201-05 Carter Building
Post Office Box 1288
Hattiesburg, Mississippi

CERTIFICATE

I, R. A. GRAY, JR., of the firm of Gray and Montague, practicing attorneys of Forrest County, Mississippi, Attorney of Record for the Defendants, Mrs. D. O. Segrest and G. C. Simmons, as County Election Commissioners of and for Forrest County, Mississippi and members of the Board of Election Commissioners thereof, and for the Defendants, W. U. Sigler, Albert S. Woods, Jr., Selby C. Bowling, J. A. P. Carter, Jr. and Herbert H. Lee, as members of the Board of Supervisors of Forrest County, Mississippi, do hereby certify that I have this day filed the original copy of the above and foregoing Answer in the office of the Clerk of the United States District Court, Southern District of Mississippi, Hattiesburg Division, at Hattiesburg, Mississippi; and further, that I have this day transmitted by United States mail, postage fully prepaid, true, literal and exact duplicate copies of said Answer to, respectively, (1) L. Lackey Rowe, Jr., Denison Ray and Martha M. Wood, 233 North Farish Street, Jackson, Mississippi 39201, Attorneys for the Plaintiffs, and (2) Honorable Joe T. Patterson, Attorney General of the State of Mississippi, New Capitol Building, Jackson, Mississippi 39201, co-Defendant.

WITNESS MY SIGNATURE on this, the 17th day of August, A.D., 1967.

S/ R. A. Gray, Jr.
R. A. GRAY, JR.

EXHIBIT A

ORDER OF THE BOARD OF SUPERVISORS OF FORREST COUNTY, MISSISSIPPI PROVIDING THAT ALL QUALIFIED ELECTORS OF FORREST COUNTY, MISSISSIPPI SHALL HENCEFORTH BE ELIGIBLE TO VOTE FOR EACH MEMBER OF THE BOARD OF SUPERVISORS OF FORREST COUNTY, MISSISSIPPI. WITH EACH CANDIDATE BEING A RESIDENT OF THE SUPERVISORS DISTRICT WHICH HE PROPOSES TO REPRESENT

There came on for consideration and determination by the Board of Supervisors of Forrest County, Mississippi the matter of providing that all of the qualified electors of Forrest County, Mississippi shall be eligible to vote for each member of the Board of Supervisors, but with each candidate being a resident of the Supervisors District which he proposes to represent; and, upon full inquiry into said matter and mature consideration thereof, and being fully advised in the premises, the Board finds, sustains and adjudicates as follows: The Board finds that under and pursuant to the provisions and authority of Section 2870, Mississippi Code of 1942, as amended by House Bill No. 223, General Laws of Mississippi of 1966, approved May 27, 1966, the board of Supervisors of any County in the State of Mississippi may adopt an Order providing that all qualified electors of the County shall be eligible to vote for each member of the Board of Supervisors of such County, but that each candidate shall be a resident of the Supervisors District which he proposes to represent; that said Order, so adopted, shall be published in a newspaper having general circulation in such County at least twelve

months prior to the next general election wherein said Supervisors are elected; that if twenty per cent (20%) of the qualified electors of such County shall present the Board of Supervisors thereof with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, an election on the question shall be called by the Board of Supervisors as provided and required by said House Bill No. 223, General Laws of Mississippi of 1966, said question being determined by a majority of those voting in such election; and that if the result of such election is that members of the Board of Supervisors shall continue to be elected by the electorate of their respective Districts, the Board of Supervisors shall not be permitted to adopt said alternative method until two (2) years have transpired. The Board further finds that it is in the best interest of Forrest County, Mississippi and the qualified electors and citizenry thereof that this Order be adopted providing that all qualified electors of Forrest County, Mississippi shall be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but that each candidate shall be a resident of the Supervisors District of Forrest County, Mississippi which he proposes to represent; and that appropriate provision be made for publication of the same as provided and required by said House Bill No. 223, General Laws of Mississippi of 1966.

IT IS, THEREFORE, ACCORDINGLY ORDERED by the Board of Supervisors of Forrest County, Mississippi that all qualified electors of Forrest County, Mississippi shall henceforth be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but

that each candidate for such office shall be a resident of the Supervisors District of Forrest County, Mississippi which he proposes to represent.

IT IS FURTHER ORDERED that the full and complete text of this Order be published in the Hattiesburg American, a daily newspaper published at Hattiesburg in Forrest County, Mississippi and having general circulation in Forrest County, Mississippi and being qualified to publish legal notices pursuant to and under the terms and provisions of Section 1858, Mississippi Code of 1942, as amended, three (3) times on consecutive Thursdays, being September 15, 22 and 29, 1966, and that said date of September 29, 1966 be, and the same is hereby fixed as the date of final publication of this Order; and that sixty (60) days after such date of September 29, 1966, this Order shall become final and be in full force and effect, unless, within said sixty (60) day interim period, twenty per cent (20%) of the qualified electors of Forrest County, Mississippi shall present the Board of Supervisors of Forrest County, Mississippi with a petition of objection requiring an election, all as contemplated by and provided in said House Bill No. 223, General Laws of Mississippi of 1966.

IT IS FURTHER ORDERED that the President and Clerk of this Board be, and they are hereby authorized, empowered and directed to execute and attest this Order in witness and evidence of the adoption and validity thereof, and further, to effect publication of this Order in strict compliance with the provisions relating thereto as

hereinabove set forth, all of their acts in so doing being hereby ratified, confirmed and approved.

SO ORDERED on this, the 13th day of September, A. D., 1966.

S/ Selby C. Bowling
President, Board of Supervisors
of Forrest County, Mississippi

ATTEST:

S/ Clyde W. Easterling
Clerk, Board of Supervisors of
Forrest County, Mississippi

(S E A L)

STATE OF MISSISSIPPI
COUNTY OF FORREST

I, Clyde W. Easterling, Chancery Clerk of Forrest County, do hereby certify that the foregoing is a true and correct copy of Order of Board of Supervisors as the same appears on record in my office in Book 63 Page 498-500. Given under my hand and official seal on this the 7 day of Aug., 1967.,

EXHIBIT B

ORDER SPREADING UPON MINUTES PROOF OF PUBLICATION OF FORMER ORDER PROVIDING THAT ALL QUALIFIED ELECTORS OF FORREST COUNTY, MISSISSIPPI SHALL BE ELIGIBLE TO VOTE FOR EACH MEMBER OF THE BOARD OF SUPERVISORS OF FORREST COUNTY, MISSISSIPPI, WITH EACH CANDIDATE BEING A RESIDENT OF THE SUPERVISORS DISTRICT WHICH HE PROPOSES TO REPRESENT

There came on for further consideration by the Board of Supervisors of Forrest County, Mississippi the matter of providing that all of the qualified electors of Forrest County, Mississippi shall be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but with each candidate being a resident of the Supervisors District which he proposes to represent, all as provided and authorized by Section 2870, Mississippi Code of 1942, as amended by House Bill No. 223, General Laws of Mississippi of 1966, approved May 27, 1966; and upon full inquiry into said matter and mature consideration thereof, and being fuly advised in the premises, the Board finds, sustains and adjudicates as follows: The Board finds that heretofore, by Order dated September 13, 1966 and of record in Supervisors Minute Book 63 at Pages 498-500, it was adjudicated and ordered that all qualified electors of Forrest County, Mississippi should henceforth be elig ble to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but that each candidate for such office should be a resident of the Supervisors District of Forrest County, Mississippi which he proposed to represent: The Board further finds that, by said Order, it was, among other th ings, directed that the full and complete text of the same be published in the Hattiesburg American, a daily newspaper published at Hattiesburg in

Forrest County, Mississippi and having general circulation in Forrest County, Mississippi and being qualified to publish legal notices pursuant to and under the terms and provisions of Section 1858, Mississippi Code of 1942, as amended, three (3) times on consecutive Thursdays, being September 15, 22 and 29, 1966, and that said date of September 29, 1966 was fixed as the date of final publication of said Order. The Board further finds that such publication of the full and complete text of said Order was duly and legally made in all respects and in every particular in full conformity with the directions thereof and all requirements of law, and that proof of such publication has been filed with the Clerk of this Board as required by law; and that the same should properly be spread upon the Minutes of this Board.

IT IS, THEREFORE, ACCORDINGLY ORDERED that said Proof of Publication be, and the same is hereby ordered spread upon and made a part of the Minutes of this Board for this date, as follows:

STATE OF MISSISSIPPI
COUNTY OF FORREST
I,Clyde W. Easterling, Chancery Clerk of Forrest County, do hereby certify that the foregoing is a true and correct copy. of Order of Board of Supervisors as the same appears on record in my office in Book 64 Page 38-39 Given under my hand and official seal on this the 7 day of August, 1967.

CLYDE W. EASTERLING,
Chancery Clerk
S/ Clyde W. Easterling

HATTIESBURG AMERICAN

PROOF OF PUBLICATION

OCT 1 1966

PASTE PROOF HERE

ORDER OF THE BOARD OF SUPERVISORS OF FORREST COUNTY, MISSISSIPPI PROVIDING THAT ALL QUALIFIED ELECTORS OF FORREST COUNTY, MISSISSIPPI SHALL HENCEFORTH BE ELIGIBLE TO VOTE FOR EACH MEMBER OF THE BOARD OF SUPERVISORS OF FORREST COUNTY, MISSISSIPPI, WITH EACH CANDIDATE BEING A RESIDENT OF THE SUPERVISORS DISTRICT WHICH HE PROPOSES TO REPRESENT

There came on for consideration and determination by the Board of Supervisors of Forrest County, Mississippi the matter of providing that all of the qualified electors of Forrest County, Mississippi shall be eligible to vote for each member of the Board of Supervisors, but with each candidate being a resident of the Supervisors District which he proposes to represent; and, upon full inquiry into said matter and mature consideration thereof, and being fully advised in the premises, the Board finds, sustains and adjudicates as follows: The Board finds that under and pursuant to the provisions and authority of Section 2870, Mississippi Code of 1942, as amended by House Bill No. 223, General Laws of Mississippi of 1966, Approved May 27, 1966 the Board of Supervisors of any County in the State of Mississippi may adopt an Order providing that all qualified electors of the County shall be eligible to vote for each member of the Board of Supervisors of such County, but that each candidate shall be a resident of the Supervisors District which he proposes to represent; that said Order, so adopted, shall be published in a newspaper having general circulation in such County at least twelve months prior to the next general election wherein said Supervisors are elected; that if twenty per cent (20%) of the qualified electors of such County shall present the Board of Supervisors thereof with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, an election on the question shall be called by the Board of Supervisors as provided and required by said House Bill No. 223, General Laws of Mississippi of 1966, said question being determined by a majority of those voting in such election, and that if the result of such election is that members of the Board of Supervisors shall continue to be elected by the electorate of their respective Districts, the Board of Supervisors shall not be permitted to adopt said alternative method until two (2) years have transpired. The Board further finds that it is in the best interest of Forrest County, Mississippi and the qualified electors and citizens thereof that this Order be adopted providing that all qualified electors of Forrest County, Mississippi shall be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but that each candidate shall be a resident of the Supervisors District of Forrest County, Mississippi which he proposes to represent, and that appropriate provision be made for publication of the same as provided and required by said House Bill No. 223, General Laws of Mississippi of 1966.

IT IS, THEREFORE, ACCORDINGLY ORDERED by the Board of Supervisors of Forrest County, Mississippi that all qualified electors of Forrest County, Mississippi shall henceforth be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but that each candidate for such office shall be a resident of the Supervisors District of Forrest County, Mississippi which he proposes to represent.

IT IS FURTHER ORDERED that the full and complete text of this Order be published in the Hattiesburg American, a daily newspaper published at Hattiesburg in Forrest County, Mississippi and having general circulation in Forrest County, Mississippi and being qualified to publish legal notices pursuant to and under the terms and provisions of Section 1459, Mississippi Code of 1942, as amended, three (3) times on consecutive Thursdays, being September 15, 22 and 29, 1966, and that said date of September 29 1966 be, and the same is hereby fixed as the date of final publication of this Order; and that sixty (60) days after such date of September 29, 1966 this Order shall become final and be in full force and effect, unless within said sixty (60) day interim period, twenty per cent (20%) of the qualified electors of Forrest County, Mississippi shall present the Board of Supervisors of Forrest County, Mississippi with a petition of objection requiring an election all as contemplated by and provided in said House Bill No. 223, General Laws of Mississippi of 1966.

IT IS FURTHER ORDERED that the President and Clerk of this Board be, and they are hereby authorized, empowered and directed to execute and attest this Order in witness and evidence of the adoption and validity thereof, and further, to effect publication of this Order in strict compliance with the provisions relating thereto as hereinabove set forth, all of their acts in so doing being hereby ratified, confirmed and approved.

SO ORDERED on this, the 13th day of September, A.D., 1966.

/s/ SELBY C. BOWLING
President, Board of Supervisors of Forrest County, Mississippi

(SEAL)

ATTEST:
/s/ CLYDE W. EASTERLING
Clerk, Board of Supervisors of Forrest County, Mississippi

Sept. 15, 22, 29, 1966-3 Thcr. C.

1500-5-66

THE STATE OF MISSISSIPPI,
FORREST COUNTY
CHANCERY CLERK

Personally appeared before me, [illegible]

a Notary Public of the City of Hattiesburg, Forrest County, Mississippi, L. H. ST. JOHN, Publisher of the HATTIESBURG AMERICAN, a daily newspaper published in the City of Hattiesburg, Forrest County, Mississippi who, being duly sworn, states that the notice, a true copy of which is hereto annexed, appeared in the issues of said newspaper as follows:

Date Sept 15, 1966

Date Sept 22, 1966

Date Sept 29, 1966

Date _____, 1966

Date _____, 1966

Number Words 681

Published 3 Times

Printer's Fee $ 55.05

Making Proof $ 1.00

Total $ 56.05

(Signed) [illegible]
Publisher

Sworn to and subscribed before me this

[illegible] day of [illegible], 1966

[illegible]
Notary Public

MY COMMISSION EXPIRES
DECEMBER 28, 1969

IT IS FURTHER ORDERED that this matter be, and the same is hereby continued for further appropriate final action thereon by the Board of Supervisors following the elapse of sixty (60) days after September 29, 1966, the date of final publication of said Order of September 19, 1966, as aforesaid.

SO ORDERED on this the 3rd day of October, A.D., 1966.

EXHIBIT C

ORDER FINALLY ADJUDICATING THAT ALL QUALIFIED ELECTORS OF FORREST COUNTY, MISSISSIPPI SHALL BE ELIGIBLE TO VOTE FOR EACH MEMBER OF THE BOARD OF SUPERVISORS OF FORREST COUNTY, MISSISSIPPI, WITH EACH CANDIDATE BEING A PRESIDENT OF THE SUPERVISORS DISTRICT WHICH HE PROPOSES TO REPRESENT

There came on for further consideration and final determination by the board of Supervisors of Forrest County, Mississippi the matter of finally adjudicating and providing that all of the qualified electors of Forrest County, Mississippi shall be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but with each candidate being a resident of the Supervisors District which he proposes to represent, all as provided and authorized by Section 2870, Mississippi Code of 1942, as amended by House Bill No. 223, General Laws of Mississippi of 1966, approved May 27, 1966, and appearing in Advance Sheet No. 9 at Pages 51-52; and, upon full inquiry into said matter and mature consideration thereof, and being fully advised in the premises, the Board finds, sustains and adjudicates as follows: The Board finds, that heretofore, by Order dated September 13, 1966, and of record in Supervisors Minute Book 63 at Pages 498-500, it was adjudicated and ordered that all qualified electors of Forrest County, Mississippi should henceforth be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but that each candidate for such office should be a resident of the Supervisors District of Forrest County, Mississippi which he proposed to represent. The Board

further finds that the full and complete text of said Order was pursuant to and under the terms and provisions of said Section 2870, as so amended, Mississippi Code of 1942, and Section 1858, as amended, Mississippi Code of 1942, published in the Hattiesburg American, a daily newspaper published at Hattiesburg in Forrest County, Mississippi and having general circulation in Forrest County, Mississippi and being qualified to publish legal notices, three (3) times on consecutive Thursdays, being September 15, 22 and 29, 1966, said dates, in further pursuance of and under the terms and provisions of said Section 2870, as so amended, Mississippi Code of 1942, being at least twelve months prior to the next general election wherein said Supervisors are elected. The Board further finds that such publication of said Order was duly and legally made in all respects and in every particular in full conformity with the directions thereof and all requirements of law, and that, by Order dated October 3, 1966 and appearing of record in Supervisors Minute Book 64, at Pages 37-39, appropriate Proof of Publication of said Order was spread upon and made a part of the Minutes of said Board, and that said Order of October 3, 1966 additionally continued said matter for further appropriate final action following the elapse of sixty (60) days from and after said date of September 29, 1966, as aforesaid, the date of final publication of said Order of September 13, 1966. The board now further affirmatively finds, sustains and adjudicates that sixty (60) days and more have elapsed from, after and since September 29, 1966, being, as aforesaid, the date of final publication of said Order of September 13, 1966, and that, within said time, the petition by twenty per cent (20%) of the qualified electors

of Forrest County, Mississippi, or any of said qualified electors of said County, has been presented to said Board objecting to such alternate method of election of the members of the Board of Supervisors of Forrest County, Mississippi as permitted, authorized and required by said Section 2870, as so amended, Mississippi Code of 1942, so as to require the calling of an election upon the question of adoption of such alternative method as therein provided; and that this Order should now be entered finally adjudicating that such alternative method is now, and hanceforth shall be, in effect, and that all qualified electors of Forrest County, Mississippi shall be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but with each candidate being a resident of the Supervisors District which he proposes to represent.

IT IS, THEREFORE, ACCORDINGLY FINALLY ADJUDICATED AND ORDERED BY THE BOARD OF SUPERVISORS OF FORREST COUNTY, MISSISSIPPI that all qualified electors of Forrest County, Mississippi shall henceforth be eligible to vote for each member of the Board of Supervisors of Forrest County, Mississippi, but that each candidate for such office shall be a resident of the Supervisors District of Forrest County, Mississippi which he proposes to represent; provided, however, that such alternative method of election of members of the Board of Supervisors of Forrest County, Mississippi shall not in any manner affect any Supervisors of Forrest County, Mississippi now holding office until the expiration and end of his present term of office.

SO ORDERED on this, the 29th day of November, A.D., 1966.

STATE OF MISSISSIPPI
COUNTY OF FORREST

I, Clyde W. Easterling, Chancery Clerk of Forrest County, do hereby certify that the foregoing is a ture and correct copy of Order - Board of Supervisors as the same appears on record in my office in Book 64 Page 238-240. Given under my hand and official seal on this the 7 day of August, 1967.

CLYDE W. EASTERLING, Chancery Clerk
S/ Clyde W. Easterling

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J. C. FAIRLEY, ET AL,

PLAINTIFFS

V. CIVIL ACTION
NO. 2205

JOE T. PATTERSON, ATTORNEY
GENERAL OF THE STATE OF
MISSISSIPPI, ET AL,

DEFENDANTS

SEPARATE ANSWER OF
DEFENDANT JOE T. PATTERSON

COMES NOW the Defendant, Joe T. Patterson, Attorney General of the State of Mississippi in his capacity as Attorney General of the State of Mississippi, and for his Answer to the Complaint exhibited against him in the above styled civil action adopts each and every defense, allegation, admission and denial contained in the Joint Answer of Defendants, Sigler, Woods, Bowling, Carter, and Lee, in the Respective Capacity of Each As a Member of the Board of Supervisors of Forrest County, Mississippi,

filed in this cause and makes same a part of his Answer as if specifically copies herein.

JOE T. PATTERSON, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI

WILLIAM A. ALLAIN, ASSISTANT ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI

BY: S/ William A. Allain
WILLIAM A. ALLAIN

CERTIFICATE OF SERVICE

I, WILLIAM A. ALLAIN, Assistant Attorney General of the State of Mississippi, do hereby certify that I have this day mailed by United States Mail, postage prepaid, one true and correct copy of the foregoing Separate Answer of Defendan Joe T. Patterson to Honorable L. Lackey Rowe, Jr., Honorable Denison Ray and Honorable Martha M. Wood, 233 North Farish Street, Jackson, Mississippi, 39201.

THIS the 21st day of August, 1967.

S/ William A. Allain

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs. CIVIL ACTION No. 4148J

JOE T. PATTERSON, et al.
Defendants.

SETH BALLARD, et al.
Plaintiffs,

vs. CIVIL ACTION No. 1200 W

JOE T. PATTERSON, et al.,
Defendants.

J.C. FAIRLEY, et al.
Plaintiff,

vs. CIVIL ACTION No. 2205 H

JOE T. PATTERSON, et al.
Defendants.

LEVI MARSAW, III, et al.
Plaintiffs,

vs. CIVIL ACTION No. 1201 W

JOE T. PATTERSON, et al.
Defendants.

CHARLES E. BUNTON, et al.
Plaintiffs,

vs. CIVIL ACTION
No.1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed: Sept. 15, 1967)

MOTION FOR SUBSTITUTION OF PARTIES AND DROPPING AND ADDING PARTIES, FOR DISMISSAL OF CERTAIN CLAIMS FOR RELIEF, AND FOR DEFAULT JUDGMENT

Plaintiffs in each of the above styled actions, by their attorneys, respectfully move this Court:

1. In Civil Action No. 4148 J:

(a) To substitute Ed William Moses as a party defendant in lieu of defendant Mrs. Mabel D. Henrich, on the ground that Mrs. Mabel D. Henrich is no longer a Holmes County Election Commissioner and Ed William Moses has been appointed as Election Commissioner in her place.

(b) To dismiss plaintiffs' second for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

(c) For a default judgment against Joe T.

Patterson, Attorney General of the State of Mississippi, on the ground that he has neither appeared nor answered within the time set for doing so by Rule 12(a) of the Federal Rules of Civil Procedure.

2. In Civil Action No. 1200 W:

(a) To substitute Robert Lee Williams as a party defendant in lieu of defendant Iler K. Ellis, on the ground that Iler K. Ellis is no longer a member of the Jefferson County Board of Education and Robert Lee Williams has assumed his place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

3. In Civil Action No. 2205 H:

(a) To substitute Mrs. Fred Blackwell as a party defendant in lieu of defendant Mrs. Mary E. Pon, on the ground that Mrs. Mary E. Pon is no longer a Forrest County Election Commissioner and Mrs. Fred Blackwell has assumed her place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

4. In Civil Action No. 1201 W:

(a) To substitute Alma D. Maddox as a party defendant in lieu of defendant Paul Keller, on the ground that Paul Keller is deceased and his place as an Adams County Election Commissioner has been assumed by Alma D. Maddox.

(b) To drop the plaintiff Majorie Baroni and add in her place as a named plaintiff, Mami L. Mazique, on the ground that Majorie Baroni is a member of the Caucasian race and Mamie L. Mazique is a member of the Negro race and desires to join in this suit.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do no wish to pursue said claim for relief.

5. In Civil Action No. 1204 W:

(a) To substitute Ethan Porter as a party defendant in lieu of defendant William Smith, on the ground that William Smith is no longer a member of the Board of Education of Claiborne County, and Ethan Porter has assumed his place.

(b) To substitute Orin R. Segrest, Jr. as a party defendant in lieu of defendant Robert Vaughn, on the ground that Robert Vaughn is no longer an Election Commissioner for Claiborne County and Orin R. Segrest, Jr., has assumed his place.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof

and further on the ground that plaintiffs do not wish to pursue said claim for relief.

Dated: September 14, 1967

Respectfully submitted,

S/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

To:

Joe T. Patterson, Esq.
Will S. Wells, Esq.
William A. Allain, Esq.
Office of the Attorney General
New Capitol Building
Jackson, Mississippi

Corban & Corban
Robert L. Corban, Esq.
Fayette, Mississippi

B. C. Callon, Esq.
P. O. Box 1315
Natchez, Mississippi

Calvin R. King, Esq.
P. O. Drawer 392
Durant, Mississippi

R. A. Gray, Jr., Esq.
Gray & Montague
201-05 Carter Building
P. O. Box 1288
Hattiesburg, Mississippi

J. T. Drake, Esq.
P. O. Box 366
Port Gibson, Mississippi

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and for Default Judgment is noticed for hearing on September 25, 1967, at 9:00 A.M., or as soon thereafter as counsel can be heard, before the Honorable Dan M. Russell, Jr., United States District Judge, in the United States Courthouse in Jackson, Mississippi.

Dated: September 14, 1967.

Respectfully submitted,

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and For Default Judgment and a copy of the foregoing Notice of Motion have been mailed this date, postage prepaid, to Joe T. Patterson, Esq., Will S. Wells, Esq., William A. Allain, Esq., Office of the Attorney General, New Capitol Building, Jackson Mississippi; Corban & Corban, Robert L. Corban, Esq., Fayette, Mississippi; B. C. Callon, Esq., P. O. Box 1315, Natchez, Mississippi; Calvin R. King, Esq., P. O. Drawer 392, Durant, Mississippi; R. A. Gray, Jr., Esq., Gray & Montague, 201-05 Carter Building, P. O. Box 1288, Hattiesburg, Mississippi and J. T. Drake, Esq., P. O. Box 366, Port Gibson, Mississippi.

Dated: September 14, 1967

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J. C. FAIRLEY, ALVIN WILLIAMS, JAMES FLUKER, REV. WALTER L. RUSSELL, JAMES BONNE, and STEPHEN LEE GRADY, on behalf of themselves and other persons similarly situated,

PLAINTIFFS

VS.

CIVIL ACTION
No. 2205

JOE T. PATTERSON, Attorney General of the State of Mississippi; W. V. SIGLER, ALBERT S. WOODS, JR., SELBY C. BOWLING, J. A. P. CARTER, JR., and HERBERT H. LEE, as members of the Board of Supervisors of Forrest County; MRS. D. O. SEGREST, MRS. FRED BLACKWELL, and G. C. SIMMONS, as County Election Commissioners for Forrest County,

DEFENDANTS

JOINT SEPARATE ANSWER OF DEFENDANTS, SEGREST, BLACKWELL AND SIMMONS, IN THE RESPECTIVE CAPACITY OF EACH AS A COUNTY ELECTION COMMISSIONER OF FORREST COUNTY, MISSISSIPPI AND A MEMBER OF THE BOARD OF COMMISSIONERS THEREOF

COME NOW the Defendants, MRS. D. O. SEGREST, MRS. BLACKWELL and G. C. SIMMONS, in their respective representative and official capacities as County Election Commissioners of and for Forrest County, Mississippi and members of the Board of Election Commissioners thereof, by and through their attorney of record hereunto duly and fully authorized and empowered, and for their Joint Separate Answer to the Complaint exhibited against them in the above Civil Action adopt each and every defense, allegation, admission and denial contained in the Joint Answer of Defendants, Sigler, Woods, Bowling, Carter and Lee, in the Respective Capacity of Each as a Member of the Board of Supervisors of Forrest County, Mississippi, filed in this Cause and make the same a part of this, their Joint Separate Answer, as if specifically copied and set forth at complete length herein.

MRS. D. O. SEGREST, MRS. FRED BLACKWELL, and G. C. SIMMONS, County Election Commissioners of and for Forrest County, Mississippi and members of the Board of Commissioners thereof

By: S/ R. A. Gray, Jr.
R. A. GRAY, JR., Attorney of
Record for said Defendants

R.A. GRAY, JR.
Gray and Montague
Attorneys at Law
201-05 Carter Building
Post Office Box 1288
Hattiesburg, Mississippi

CERTIFICATE

I, R. A. GRAY, JR., of the firm of Gray and Montague, practicing attorneys of Forrest County, Mississippi, attorney of record for the Defendants, Mrs. D. O. Segrest, Mrs. Fred Blackwell, and G. C. Simmons, as County Election Commissioners of and for Forrest County, Mississippi and members of the Board of Election Commissioners thereof, do hereby certify that I have this day filed the original copy of the above and foregoing Answer in the office of the Clerk of the United States District Court, Southern District of Mississippi, Hattiesburg Division, at Hattiesburg, Mississippi; and further, that I have this day transmitted by United States mail, postage fully prepaid, true, literal and exact duplicate copies of said Answer to, respectively, (1) L. Lackey Rowe, Jr., Denison Ray, and Martha M. Wood, 233 North Farish Street, Jackson, Mississippi, Attorneys for the Plaintiffs, and (2) Honorable Joe T. Patterson, Attorney General of the State of Mississippi, New Capitol Building Jackson, Mississippi 39201, co-Defendant. No certificate of service is made with respect to the defendant members of the Board of Supervisors of Forrest County, Mississippi as I am also attorney of record for them.

WITNESS MY SIGNATURE on this, the 27th day of September, A.D., 1967.

R. A. Gray, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 4148J

JOE T. PATTERSON, et al.
Defendants.

SETH BALLARD, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1200 W

JOE T. PATTERSON, et al.,
Defendants.

J.C. FAIRLEY, et al.
Plaintiff,

vs.

CIVIL ACTION
No. 2205 H

JOE T. PATTERSON, et al.
Defendants.

LEVI MARSAW, III, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1201 W

JOE T. PATTERSON, et al.
Defendants.

CHARLES E. BUNTON, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed: Sep. 28, 1967)

ORDER

It appearing that the Order entered on September 25, 1967, in Civil Action Number 2205H and 1201W should be clarified to make plain the intention of the Court,

IT IS ORDERED, that the same be and they are hereby amended to read as follows:

In Civil Action No. 2205H, Mrs. Fred Blackwell is, hereby, added as a party-defendant; The Complaint is dismissed as to the defendant Mrs. Mary E. Pon; That Plaintiffs' second claim for relief be, and the same is, hereby dismissed without prejudice.

In Civil Action No. 1201W, Alma D. Maddox is, hereby, added as a party-defendant; The Complaint is dismissed as to the Defendant Paul Keller; Plaintiff Marjorie Baroni is, hereby, dropped as a party-plaintiff and Mamie L. Mazique is added as a party-plaintiff; Plaintiffs' second claim is, hereby, dismissed without prejudice.

ORDERED, this the 28th day of September, 1967.

s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

J. C. FAIRLEY, ET AL

PLAINTIFFS

VS. CIVIL ACTION
No. 2205 H

JOE T. PATTERSON, ET AL

DEFENDANTS

(Filed: Oct. 10, 1967)

ORDER

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether or not Section 2870 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 2870, as amended by the legislature of Mississippi at its regular session of 1966, does not come within the purview of and

is not covered by Title 42, Section 1973(c) U.S.C., and that plaintiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in this action be, and the same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE
Acting For and on Behalf of The Court

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JOHN F. DAVIS,

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1968

Number 26

SETH BALLARD, ET AL.,
Appellants,
versus
JOE T. PATTERSON, ET AL.,
Appellees.

CHARLES E. BUNTON, ET AL.,
Appellants,
versus
JOE T. PATTERSON, ET AL.,
Appellees.

VERNON TOM GRIFFIN, ET AL.,
Appellants,
versus
JOE T. PATTERSON, ET AL.,
Appellees.

Lawrence Aschenbrenner
Martha M. Wood
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Appellants

Civil Docket Entries - No. 1204

8-10-67 COMPLAINT, original and twelve (12) copies filed.

9-8-67 Answer of Defendants John Cade and L. B. Allen, Jr., with Certificate of Service - filed in quadruplicate.

9-8-67 Answer of Defendants Grover Goodwin, Dr. Frank Headley, Robert Templeton and Harold Barland, with Certificate of Service filed in quadruplicate.

9-15-67 Motion for Substitution of Parties and dropping and adding parties and for dismissal of certain claims for relief and for default Judgment, filed.

9-28-67 Order amending the Order heretofore filed and entered in this cause on September 25, 1967, adding Ethan Porter as a defendant, dismissing complaint as to defendant William Smith, adding Orin R. Segrest, Jr., as a party -defendant and dismissing complaint as to defendant Robert Vaughn and dismissing Plaintiffs' second claim for relief without prejudice, filed and entered OB 1967 pages 213 and 214.

10-9-67 Order denying injunction prayed for and dismissing complaint at the cost of Plaintiffs, filed and entered Pages 230 and 231 the cost of Plaintiffs, filed and entered Pages 230 and 231.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CHARLES E. BUNTON and WILLIAM ROSS,
on behalf of themselves and all
other persons similarly situated,
Plaintiffs,

CIVIL ACTION
NO. 1204

-vs-

-vs-

JOE T. PATTERSON, Attorney General of
the State of Mississippi; GROVER
GOODWIN, DR. FRANK HEADLEY, ROBERT
TEMPLETON, HAROLD BARLAND, as
members of the Board of Education
of Claiborne County; JOHN CADE,
and L. B. ALLEN, JR., as County
Election Commissioners for Claiborne
County,
Defendants.

(Filed Aug. 10, 1967)

COMPLAINT

1. This action arises under the Voting Rights Act of 1965 (Title 42 U.S.C. Section 1973), Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1971. It seeks a declaratory judgment that Section 6271-08 of the Mississippi Code, as

amended, is violative of said Voting Rights Act, Fourteenth and Fifteenth Amendments and 42 U.S.C.§ 1971, and preliminary and permanent injunctions against the application and enforcement of said Section 6271-08 by the Board of Education of Claiborne County, Mississippi, and against the appointment of the Superintendent of Education for Claiborne County by the Board of Education of Claiborne County pursuant to or in accordance with the provisions of Section 6271-08.

2. Jurisdiction is conferred on this Court by Title 28 U.S.C. §§ 1343(3) and (4), 2201 and 2202, and by Title U.S.C.§§ 1971 (d) and 1973(j)(f). A district court of three judges is required to be convened by Title 28 U.S.C. Section 2281 and Title 43 U.S. C. Section 1973c.

3. Plaintiffs are all adult Negro citizens of Mississippi and of the United States, and are citizens, residents and qualified electors of Claiborne County, Mississippi.

4. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated as qualified electors of Claiborne County and as potential candidates for Superintendent of Education of Claiborne County, pursuant to Rule 23 of the Federal Rules of Civil Procedure. As to the classes: (1) they are so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the classes; (3) the claims of the plaintiffs are typical of the claims of the classes; (4) plaintiffs will fairly and adequately protect the interests of the classes; and (5) defendants have acted and

will act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the classes as a whole.

5. Defendant Joe T. Patterson is Attorney General of the State of Mississippi.

6. (a) Defendants Goodwin, Headley, Templeton, Barland are members of the Board of Education of Claiborne County, and as such, have the power under the amended version of Section 6271-08 of the Mississippi Code, to appoint the County Superintendent of Education for Claiborne County, which Superintendent would have the power and the duty to supervise the public schools to comply with the various laws relating thereto, pursuant to Sections 6252-01 *et seq.* of the Mississippi Code.

(b) Defendants Cade, and Allen are the County Election Commissioners for Claiborne County and, as such, supervise and administer all general elections in Claiborne County pursuant to Sections 3204 *et seq.* of the Mississippi Code.

FIRST CLAIM FOR RELIEF

7. Each county in Mississippi, including Claiborne County, has a public school system governed in certain respects by the County Superintendent of Education. Prior to and on November 1, 1964, and up until the date referred to in paragraph 8 hereof, every county in Mississippi except one elected its Superintendent of

Education unless it held a special election pursuant to statute to make such post appointive. (Mississippi Code 6271-08) Claiborne County has always elected its County Superintendent of Education.

8. Effective June 17, 1966, the Legislature of Mississippi with the approval of Governor Paul B. Johnson, amended the aforesaid Section 6271-08 to provide that in certain described counties, the Superintendent of Education must be appointed rather than elected. Specifically, Section 6271-08, as herein relevant, before amendment read:

> "(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at

least three (3) consecutive weeks in at least one newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the

elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided."

Following its amendment in 1966, Section 6271-08, as herein relevant, reads:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the Board of supervisors of such county, within sixty (60) days after the filing of such petition to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective of shall be filled by appointment by the county board of

education of said county. Provided, however, that where a Class Three county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county, the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors

who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in the office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U.S. Highways 49 and 51, and State

Highways 16, 17 and 43 and the Natchez Trace; in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U.S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect; in any county created after 1916 through which the Yazoo River flows; in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a landgrant institution or lands contiguous thereto owned by the institution; in any county lying within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960; in any county having a population of twenty-six thousand seven hundred fifty-nine (26,759) according to the 1960 Federal census, and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect; in any Class Three county wherein is partially located a national forest and wherein U.S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00; the county superintendent of

education hereafter shall be appointed by the county board of education.

"In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972." (Emphasis added. Underlined portion is description fitting Claiborne County.)

9. The Voting Rights Act of 1965 (42 U.S.C. § 1973) is applicable to the State of Mississippi. That Act provides in Section 5 that whenever a State, or political subdivision thereof:

"shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964"

the State or subdivision cannot enforce such new qualification prerequisite, standard, practice or procedure unless and until it either:

(a) institutes an action in the United States District Court for the District of Columbia, and said court enters a declaratory judgment that such qualification, prerequisite, standard, practice, or provedure does not have the

purpose and will not have the effect of denying or abridging the right to vote on account of race or color; or

(b) submits such qualification, prerequisite, standard, practice, or procedure to the Attorney General of the United States and the Attorney General does not interpose an objection within 60 days after such submission.

10. The amendment to Section 6271-08 as described in paragraph eight (8) hereof is such a change in qualification, prerequisite, standard, practice, or procedure as is referred to in Section 5 of the Voting Rights Act of 1965.

11. Neither the State of Mississippi, nor any of its officials, nor Claiborne County, Mississippi, nor any of its officials has:

(a) instituted any action in the United States District Court for the District of Columbia for a declaratory judgment that Section 6271-08 of the Mississippi Code, as amended, does not have the effect of, denying or abridging the right to vote on account of race or color, nor

(b) submitted said amended section of the Code to the Attorney General of the United States for his approval.

Inasmuch as the enactment of the amendment to Section 6271-08 of the Mississippi Code by the State of Mississippi is in violation of the requirements of Section 5 of the Voting Rights Act of 1965, said enactment is void and of no legal force or effect. Plaintiffs have no adequate remedy at law and unless the relief requested herein is granted, plaintiffs will suffer irreparable harm in that their rights and the rights of the classes they represent to vote and run for public office will be denied and abridged in violation of Title 42 U.S.C. § 1973.

SECOND CLAIM FOR RELIEF

12. Plaintiffs reaver each and every averment contained in paragraphs 7 through 8 hereof.

13. The amendment to Section 6271-08 of the Mississippi Code, as described in paragraph 8 hereof has the purpose and effect of:

(a) denying or abridging, on account of race or color, the votes of the individual plaintiffs and the classes they represent;

(b) preventing the election of Negro candidates to the office of County Superintendent of Education by making said office appointive in those specially designated counties in Section 6271-08, such as Claiborne County, which have Negro voting majorities; and

(c) preventing potential Negro candidates to the

office of County Superintendent of Education from holding that office by election or appointment as white county boards of education, such as that in Claiborne County, elected at a time when Negroes were largely denied the right to vote on account of race or color, are not likely seriously to consider the appointment of qualified Negroes to the office of County Superintendent of education, thus denying or abridging, on account of race or color, the right of those persons to participate in Government as officeholders.

14. For the reasons stated in paragraph 13 above, Section 6271-08 of the Mississippi Code, as amended, violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S. C. §§ 1971 and 1973.

WHEREFORE, plaintiffs pray that:

1. Pursuant to the provisions of 28 U.S.C. § § 2281 and 2283 and 42 U.S.C. § 1973c, a district court of three judges be convened.

2. This Court declare that Section 6271-08 of the Mississippi Code, as amended, and also as applied in Claiborne County, is in violation of the Voting Rights Act of 1965 (Title 42 U.S.C. § 1973), the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1971, and therefore void.

3. This Court issue preliminary and permanent

injunctions enjoining defendants, their agents, employees, successors and all persons in active concert and participation with them from enforcing, implementing or otherwise giving effect to Section 6271-08 of the Mississippi Code, as amended, in any way whatsoever.

4. This Court enjoin the appointment of the Superintendent of Education of Claiborne County unless and until appointment is authorized by the voters of the county pursuant to Section 6271-08 prior to its amendment as aforesaid, or until Section 5 of the Voting Rights Act of 1965 is complied with by defendants.

5. This Court order the defendants, their agents, employees, successors, and all persons in active concert and participation with them to hold elections for the Claiborne County Superintendent of Education on November 7, 1967.

6. This Court retain jurisdiction of this cause.

7. This Court grant plaintiffs such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

Dated: Aug. 8, 1967.

Respectfully submitted,

S/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
223 North Farish Street
Jackson, Mississippi 39201
Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CHARLES E. BUNTON, ETC., ET AL
PLAINTIFFS

VS.

CIVIL ACTION
NO. 1204

JOE. T. PATTERSON, ETC., ET Al
DEFENDANTS

ANSWER OF DEFENDANTS

The Defendants Grover Goodwin, Dr. Frank Headley, Robert Templeton and Harold Barland, members of the Board of Education of Claiborne County, Mississippi, by their attorneys, filed herewith their answer to the above styled and numbered action:

1. Defendants deny that this Court has jurisdiction of their persons or the subject matter of this action.

2. Defendants are without information sufficient to form a belief as to the truth of the averments of Paragraph 3 of the Complaint and, thereby, deny the same.

3. Defendants deny that Plaintiffs have the capacity to bring this action on behalf of the class they seek to represent or that they can, and will, fairly and adequately protect the interest of such class, all as alleged in Paragraph 4 of the Complaint.

4. Defendants admit the allegations of Paragraph 5 of the Complaint.

Defendants admit that the defendants Goodwin, Headley, Templeton, and Barland are members of the Board of Education of Claiborne County, Mississippi, but deny that the defendant Smith is a member of said board. They admit that they have certain powers and duties under Section 6271-08 and Section 6252-01, et seq., of the Mississippi Code and submit that said sections speak for themselves.

Defendants admit that the defendants Cade and Allen are members of the County Election Commission of Claiborne County, but deny that the defendant Vaughn is a member of such commission. They admit that the County Election Commission of Claiborne County has general supervision of general elections in Claiborne County all as alleged in Paragraph 6(b) of the Complaint.

6. Defendants admit that each county in Mississippi, including Claiborne County, has a public school system governed in certain respects by the County Superintendent of Education. They are without information sufficient to form a belief as to the truth of the averments of the second and third sentences of Paragraph 7 of the Complaint.

7. Defendants admit the allegations of Paragraph 8 of the Complaint.

8. Defendants admit the allegations of Paragraph 9

of the Complaint.

9. Defendants deny the allegations of Paragraph 10 of the Complaint.

10. Defendants admit the allegations of Paragraphs 11(a) and (b) of the Complaint. All other allegations of Paragraph 11 are denied.

11. For their answer to Paragraph 12 of the Complaint, the Defendants re-aver each and every part of their answer to Paragraphs 7 through 8 of the Complaint.

12. Defendants deny the allegations of Paragraph 13 of the Complaint, including subparagraphs a, b, and c, thereof.

13. Defendants deny the allegations of Paragraph 14 of the Complaint.

Further answering the Complaint, Defendants deny that Plaintiffs are entitled to any relief in this action and allege that the same should be dismissed at the cost of plaintiffs.

J. T. DRAKE, JR. SPECIAL COUNSEL
POST OFFICE BOX 366
PORT GIBSON, MISSISSIPPI

JOE T. PATTERSON,
ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI

WELL S. WELLS,
ASSISTANT ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Answer of Defendants have been mailed via United States Mail, postage prepaid, to Honorable L. Lackey Rowe, Jr., 233 North Farish Street, Jackson, Mississippi, one of the attorneys of record for plaintiffs.

DONE, this the 7th day of September, 1967.

S/ Will S. Wells
WILL S. WELLS
ASSISTANT ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI

ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CHARLES E. BUNTON, ETC., ET AL
PLAINTIFFS

VS.

CIVIL ACTION
NO. 1204

JOE T. PATTERSON, ETC., ET AL
DEFENDANTS

ANSWER OF DEFENDANTS

The Defendants, John Cade and L. B. Allen, Jr., members of the County Election Commission of Claiborne County, Mississippi, by their attorneys, file herewith their answer to the Complaint in this action:

1. The Defendants deny that this Court has jurisdiction of their persons or the subject matter of this action.

2. For their answer to the Complaint in this action, the above named defendants adopt the answer in every respect of the Defendants Goodwin, Headley, Templeton and Barland to the Complaint filed herein against them, as their answer to said Complaint.

J. T. DRAKE, Jr., SPECIAL COUNSEL
POST OFFICE BOX 366
PORT GIBSON, MISSISSIPPI

JOE T. PATTERSON, ATTORNEY GENERAL
OF THE STATE OF MISSISSIPPI

WILL S. WELLS, ASSISTANT ATTORNEY
GENERAL OF THE STATE OF
MISSISSIPPI

Attorneys for Defendants

BY: S/ Will S. Wells
WILL S. WELLS, Of Counsel

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Answer of Defendants have been mailed via United States Mail, postage prepaid, to Honorable L. Lackey Rowe, Jr., 233 North Farish Street, Jackson, Mississippi, one of the attorneys of record for plaintiffs.

DONE, this the 7th day of September, 1967.

S/ Will S. Wells
WILL S. WELLS
ASSISTANT ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI

ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs.

JOE T. PATTERSON, et al.
Defendants.

CIVIL ACTION
No. 4148J

SETH BALLARD, et al.
Plaintiffs,

vs.

JOE T. PATTERSON, et al.,
Defendants.

CIVIL ACTION
No. 1200 W

J.C. FAIRLEY, et al.
Plaintiff,

vs.

JOE T. PATTERSON, et al.
Defendants.

CIVIL ACTION
No. 2205 H

LEVI MARSAW, III, et al.
Plaintiffs,

vs.

JOE T. PATTERSON, et al.
Defendants.

CIVIL ACTION
No. 1201 W

CHARLES E. BUNTON, et al.
Plaintiffs,

vs. CIVIL ACTION
No.1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed: Sept. 15, 1967)

MOTION FOR SUBSTITUTION OF PARTIES AND DROPPING AND ADDING PARTIES, FOR DISMISSAL OF CERTAIN CLAIMS FOR RELIEF, AND FOR DEFAULT JUDGMENT

Plaintiffs in each of the above styled actions, by their attorneys, respectfully move this Court:

1. In Civil Action No. 4148 J:

(a) To substitute Ed William Moses as a party defendant in lieu of defendant Mrs. Mabel D. Henrich, on the ground that Mrs. Mabel D. Henrich is no longer a Holmes County Election Commissioner and Ed William Moses has been appointed as Election Commissioner in her place.

(b) To dismiss plaintiffs' second for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

(c) For a default judgment against Joe T.

Patterson, Attorney General of the State of Mississippi, on the ground that he has neither appeared nor answered within the time set for doing so by Rule 12(a) of the Federal Rules of Civil Procedure.

2. In Civil Action No. 1200 W:

(a) To substitute Robert Lee Williams as a party defendant in lieu of defendant Iler K. Ellis, on the ground that Iler K. Ellis is no longer a member of the Jefferson County Board of Education and Robert Lee Williams has assumed his place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

3. In Civil Action No. 2205 H:

(a) To substitute Mrs. Fred Blackwell as a party defendant in lieu of defendant Mrs. Mary E. Pon, on the ground that Mrs. Mary E. Pon is no longer a Forrest County Election Commissioner and Mrs. Fred Blackwell has assumed her place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

4. In Civil Action No. 1201 W:

(a) To substitute Alma D. Maddox as a party defendant in lieu of defendant Paul Keller, on the ground that Paul Keller is deceased and his place as an Adams County Election Commissioner has been assumed by Alma D. Maddox.

(b) To drop the plaintiff Majorie Baroni and add in her place as a named plaintiff, Mami L. Mazique, on the ground that Majorie Baroni is a member of the Caucasian race and Mamie L. Mazique is a member of the Negro race and desires to join in this suit.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do no wish to pursue said claim for relief.

5. In Civil Action No. 1204 W:

(a) To substitute Ethan Porter as a party defendant in lieu of defendant William Smith, on the ground that William Smith is no longer a member of the Board of Education of Claiborne County, and Ethan Porter has assumed his place.

(b) To substitute Orin R. Segrest, Jr. as a party defendant in lieu of defendant Robert Vaughn, on the ground that Robert Vaughn is no longer an Election Commissioner for Claiborne County and Orin R. Segrest, Jr., has assumed his place.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof

pursue said claim for relief.

Dated: September 14, 1967

Respectfully submitted,

S/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

To:

Joe T. Patterson, Esq.
Will S. Wells, Esq.
William A. Allain, Esq.
Office of the Attorney General
New Capitol Building
Jackson, Mississippi

Corban & Corban
Robert L. Corban, Esq.
Fayette, Mississippi

B. C. Callon, Esq.
P. O. Box 1315
Natchez, Mississippi

Calvin R. King, Esq.
P. O. Drawer 392
Durant, Mississippi

R. A. Gray, Jr., Esq.
Gray & Montague
201-05 Carter Building
P. O. Box 1288
Hattiesburg, Mississippi

J. T. Drake, Esq.
P. O. Box 366
Port Gibson, Mississippi

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and for Default Judgment is noticed for hearing on September 25, 1967, at 9:00 A.M., or as soon thereafter as counsel can be heard, before the Honorable Dan M. Russell, Jr., United States District Judge, in the United States Courthouse in Jackson, Mississippi.

Dated: September 14, 1967.

Respectfully submitted,

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and For Default Judgment and a copy of the foregoing Notice of Motion have been mailed this date, postage prepaid, to Joe T. Patterson, Esq., Will S. Wells, Esq., William A. Allain, Esq., Office of the Attorney General, New Capitol Building, Jackson Mississippi; Corban & Corban, Robert L. Corban, Esq., Fayette, Mississippi; B. C. Callon, Esq., P. O. Box 1315, Natchez, Mississippi; Calvin R. King, Esq., P. O. Drawer 392, Durant, Mississippi; R. A. Gray, Jr., Esq., Gray & Montague, 201-05 Carter Building, P. O. Box 1288, Hattiesburg, Mississippi and J. T. Drake, Esq., P. O. Box 366, Port Gibson, Mississippi.

Dated: September 14, 1967

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs.

JOE T. PATTERSON, et al.
Defendants.

CIVIL ACTION
No. 4148J

SETH BALLARD, et al.
Plaintiffs,

vs.

JOE T. PATTERSON, et al.,
Defendants.

CIVIL ACTION
No. 1200 W

J.C. FAIRLEY, et al.
Plaintiff,

vs.

JOE T. PATTERSON, et al.
Defendants.

CIVIL ACTION
No. 2205 H

LEVI MARSAW, III, et al.
Plaintiffs,

vs.

JOE T. PATTERSON, et al.
Defendants.

CIVIL ACTION
No. 1201 W

CHARLES E. BUNTON, et al.
Plaintiffs,

vs.. CIVIL ACTION
No.1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed Sept. 28, 1967)

ORDER

It appearing that the Order entered on September 25, 1967, in Civil Action Number 4148J, 1200W and 1204W should be clarified to make plain the intention of the Court,

IT IS ORDERED, that the same be and they are hereby amended to read as follows:

In Civil Action No. 4148J, Ed William Moses is, hereby, added as a party-defendant; The Complaint is dismissed as to the defendant Mrs. Mabel D. Henrich; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.

In Civil Action Number 1200W, Robert Lee Williams is, hereby, added as a party-defendant; The Complaint is dismissed as to Iler K. Ellis; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.

In Civil Action No. 1204W, Ethan Porter is, hereby, added as a party-defendant; The Complaint is dismissed as to the defendant, William Smith; Orin R. Segrest, Jr., is,

hereby, added as a party-defendant; The Complaint is dismissed as to the Defendant Robert Vaughn; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.

ORDERED, this the 28th day of September, 1967.

S/Harold Cox
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

CHARLES E. BUNTON, ET AL
PLAINTIFFS

VS. CIVIL ACTION NO. 1204W

JOE T. PATTERSON, ET AL
DEFENDANTS

(Filed Oct. 8, 1967)

ORDER

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether or not Section 6271-08 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 6271-08 as amended by the legislature of Mississippi at its regular session of 1966 does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C., and that plaintiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in this action be, and the same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

S/ Harold Cox
UNITED STATES DISTRICT JUDGE
Acting For and on Behalf of The Court

A TRUE COPY, I HEREBY CERTIFY.
ROBERT C. THOMAS, CLERK
BY:
S/ Ruby L. Short
Deputy Clerk
Dated: 10/8/67

No. 1200-Civil Docket Entries

7-14-67 COMPLAINT, original and twelve copies filed.

8-23-67 , Answer of Defendants Sam Bullen, John Jewell Ball and Randolph Cupit, with certificateof service-filed.

9-15-67 Motion for Substitution of Parties and Dropping and adding parties, for dismissal of certain claims for relief, and for Default Judgment-filed.

9-28-67 Order amending order heretofore entered in this cause on September 25, 1967 adding Robert Lee Williams as a party-defendant to this cause, dismissing the complaint as to defendant Iler K. Ellis and dismissing without prejudice Plaintiffs' second claim for relief, filed and entered O B 1967 pages 211 and 212.

10-9-67 Order dismissing the complaint, denying injunction prayed for in said complaint, at the cost of plaintiffs, filed and entered OB 1967 page 226 and 227.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
VICKSBURG DIVISION

SETH BALLARD and CHARLES EVERS, on behalf of themselves and all other persons similarly situated,
Plaintiffs,

-vs- CIVIL ACTION NO. 1200

JOE T. PATTERSON, Attorney General of the State of Mississippi; ROBERT LEE WILLIAMS, I. D. STEWART, EMILE GUEDON, TRULY CUPIT and ANON KILLINGSWORTH, as Members of the Board of Education of Jefferson County; SAM BULLEN, JOHN JEWELL BALL and RANDOLPH CUPIT as County Election Commissioners for Jefferson County.
Defendants.

COMPLAINT

1. This action arises under the Voting Rights Act of 1965 (Title 42 U.S.C. § 1973), Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1971. It seeks a declaratory judgment that Section 6271-08 of the Mississippi Code, as amended, is violative of said Voting Rights Act, Fourteenth and Fifteenth Amendments and 42 U.S.C. § 1971, and preliminary and permanent injunctions against the application and enforcement of said Section 6271-08 by the Board of Education of Jefferson County, Mississippi, and against the appointment of the Superintendent of Education for Jefferson County by the Board of Education of Jefferson County pursuant to or in accordance with the provisions of Section 6271-08.

2. Jurisdiction is conferred on this Court by Title 28 U.S.C. § § 1343(3) and (4), 2201 and 2202, and by Title U.S.C.§ § 1971 (d) and 1973(j)(f). A district court of three judges is required to be convened by Title 28 U.S.C. Section 2281 and Title 43 U.S. C. Section 1973c.

3. Plaintiffs are all adult Negro citizens of Mississippi and of the United States, and are citizens, residents and qualified electors of Jefferson County, Mississippi.

4. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated as qualified electors of Jefferson County and as potential candidates for Superintendent of Education of Jefferson County, pursuant to Rule 23 of the Federal Rules of Civil Procedure. As to the classes: (1) they are so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the classes; (3) the claims of the plaintiffs are typical of the claims of the classes; (4) plaintiffs will fairly and adequately protect the interests of the classes; and (5) defendants have acted and will act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the classes as a whole.

5. Defendant Joe T. Patterson is Attorney General of the State of Mississippi.

6. (a) Defendants Ellis, Stewart, Guedon,Cupit and Killingsworth are members of the Jefferson County, and as such, have the power under the amended version of Section 6271-08 of the

Mississippi Code, to appoint the County Superintendent of Education for Jefferson County, which Superintendent would have the power and the duty to supervise the public schools to comply with the various laws relating thereto, pursuant to Sections 6252-01 *et seq.* of the Mississippi Code.

(b) Defendants Bullen, Ball and Cupit are the County Election Commissioners for Claiborne County and, as such, supervise and administer all general elections in Jefferson County pursuant to Sections 3204 *et seq.* of the Mississippi Code.

FIRST CLAIM FOR RELIEF

7. Each county in Mississippi, including Jefferson County, has a public school system governed in certain respects by the County Superintendent of Education. Prior to and on November 1, 1964, and up until the date referred to in paragraph 8 hereof, every county in Mississippi except one elected its Superintendent of Education unless it held a special election pursuant to statute to make such post appointive. (Mississippi Code 6271-08) Jefferson County has always elected its County Superintendent of Education.

8. Effective June 17, 1966, the Legislature of Mississippi with the approval of Governor Paul B. Johnson, amended the aforesaid Section 6271-08 to provide that in certain described counties, the Superintendent of Education must be appointed rather than elected.

Specifically, Section 6271-08, as herein relevant, before amendment read:

> "(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in

addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last

decennial federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided."

Following its amendment in 1966, Section 6271-08, as herein relevant, reads:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the Board of supervisors of such county, within sixty (60) days after the filing of such petition to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective of shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class Three county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county, the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of

such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the

provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in the office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U.S. Highways 49 and 51, and State Highways 16, 17 and 43 and the Natchez Trace; in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U.S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect; in any county created after 1916 through which the Yazoo River flows; in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14

intersect; in any county bordering on the Mississippi River wherein lies the campus of a landgrant institution or lands contiguous thereto owned by the institution; in any county lying within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960; in any county having a population of twenty-six thousand seven hundred fifty-nine (26,759) according to the 1960 Federal census, and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect; in any Class Three county wherein is partially located a national forest and wherein U.S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00; the county superintendent of education hereafter shall be appointed by the county board of education.

"In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972." (Emphasis added. Underlined portion is description fitting Jefferson County.)

9. The Voting Rights Act of 1965 (42 U.S.C. 1973) is applicable to the State of Mississippi. That Act provides in Section 5 that whenever a State, or political subdivision thereof:

> "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964"

the State or subdivision cannot enforce such new qualification prerequisite, standard, practice or procedure unless and until it either:

> (a) institutes an action in the United States District Court for the District of Columbia, and said court enters a declaratory judgment that such qualification, prerequisite, standard, practice, or provedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color; or
>
> (b) submits such qualification, prerequisite, standard, practice, or procedure to the Attorney General of the United States and the Attorney General does not interpose an objection within 60 days after such submission.

10. The amendment to Section 6271-08 as described in paragraph eight (8) hereof is such a change in qualification, prerequisite, standard, practice, or procedure as is referred to in Section 5 of the Voting Rights Act of 1965.

11. Neither the State of Mississippi, nor any of its officials, nor Jefferson County, Mississippi, nor any of its officials has:

(a) instituted any action in the United States District Court for the District of Columbia for a declaratory judgment that Section 6271-08 of the Mississippi Code, as amended, does not have the effect of, denying or abridging the right to vote on account of race or color, nor

(b) submitted said amended section of the Code to the Attorney General of the United States for his approval.

Inasmuch as the enactment of the amendment to Section 6271-08 of the Mississippi Code by the State of Mississippi is in violation of the requirements of Section 5 of the Voting Rights Act of 1965, said enactment is void and of no legal force or effect. Plaintiffs have no adequate remedy at law and unless the relief requested herein is granted, plaintiffs will suffer irreparable harm in that their rights and the rights of the classes they represent to vote and run for public office will be denied and abridged in violation of Title 42 U.S.C. § 1973.

SECOND CLAIM FOR RELIEF

12. Plaintiffs reaver each and every averment contained in paragraphs 7 through 8 hereof.

13. The amendment to Section 6271-08 of the Mississippi Code, as described in paragraph 8 hereof has the purpose and effect of:

(a) denying or abridging, on account of race or color, the votes of the individual plaintiffs and the classes they represent;

(b) preventing the election of Negro candidates to the office of County Superintendent of Education by making said office appointive in those specially designated counties in Section 6271-08, such as Jefferson County, which have Negro voting majorities; and

(c) preventing potential Negro candidates to the office of County Superintendent of Education from holding that office by election or appointment as white county boards of education, such as that in Jefferson County, elected at a time when Negroes were largely denied the right to vote on account of race or color, are not likely seriously to consider the appointment of qualified Negroes to the office of County Superintendent of education, thus denying or abridging, on account of race or color, the right of those persons to participate in Government as officeholders.

14. For the reasons stated in paragraph 13 above, Section 6271-08 of the Mississippi Code, as amended, violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S. C. § § 1971 and 1973.

WHEREFORE, plaintiffs pray that:

1. Pursuant to the provisions of 28 U.S.C.

§§ 2281 and 2283 and 42 U.S.C. § 1973c, a district court of three judges be convened.

2. This Court declare that Section 6271-08 of the Mississippi Code, as amended, and also as applied in Jefferson County, is in violation of the Voting Rights Act of 1965 (Title 42 U.S.C. § 1973), the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1971, and therefore void.

3. This Court issue preliminary and permanent injunctions enjoining defendants, their agents, employees, successors and all persons in active concert and participation with them from enforcing, implementing or otherwise giving effect to Section 6271-08 of the Mississippi Code, as amended, in any way whatsoever.

4. This Court enjoin the appointment of the Superintendent of Education of Jefferson County unless and until appointment is authorized by the voters of the county pursuant to Section 6271-08 prior to its amendment as aforesaid, or until Section 5 of the Voting Rights Act of 1965 is complied with by defendants.

5. This Court order the defendants, their agents, employees, successors, and all persons in active concert and participation with them to hold elections for the Jefferson County Superintendent of Education on November 7, 1967.

6. This Court retain jurisdiction of this

cause.

7. This Court grant plaintiffs such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

Dated: July 12, 1967

Respectfully submitted,

S/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
223 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
VICKSBURG DIVISION

SETH BALLARD, ET AL
PLAINTIFFS

V.

CIVIL ACTION
NO. 1200

JOE T. PATTERSON, ET AL
DEFENDANTS

ANSWER OF DEFENDANTS

The Defendants, Sam Bullen, John Jewell Ball, and Randolph Cupit, County Election Commissioners of Jefferson County, Mississippi, by their attorneys, file herewith their answer to the Complaint in this action:

1. Defendants deny that this Court has jurisdiction of their persons or the subject matter of this action.

2. For their answer to the Complaint in this action, the above named Defendants adopt the answer in every aspect of the Defendants Cupit, Killingsworth Stewart and Guedon to the Complaint filed herein against them.

JOE T. PATTERSON,
ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI

WILL S. WELLS, ASSISTANT
ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI

Attorneys For Defendants

BY:
WILL S. WELLS
Of Counsel

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Answer of Defendants have been mailed via United States Mail, postage prepaid, to Honorable L. Lackey Rowe, Jr., 233 North Farish Street, Jackson, Mississippi, one of the attorneys of record for plaintiffs.

DONE, this the 22nd day of September, 1967.

S/ Will S. Wells
WILL S. WELLS
ASSISTANT ATTORNEY GENERAL OF
THE STATE OF MISSISSIPPI

ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
VICKSBURG DIVISION

SETH BALLARD, ET AL
PLAINTIFFS

V. CIVIL ACTION
NO. 1200

JOE T. PATTERSON, ET AL
DEFENDANTS

ANSWER OF DEFENDANTS

The Defendants, Truly Cupit, Anon Killingsworth, Mrs. I. D. Stewart, Mrs. Emile Guedon, Members of the Board of Education of Jefferson County, Mississippi, by their attorneys, file herewith their answer to the Complaint in the above styled and numbered action.

1. Defendants deny that this Court has jurisdiction of their persons or the subject matter of this action.

2. Defendants are without information sufficient to form a belief as to the truth of the averments of Paragraph 3 of the Complaint and, thereby, deny the same.

3. Defendants deny that Plaintiffs have the capacity to bring this action on behalf of the class they seek to represent or that they can, and will, fairly and adequately protect the interest of such class, all as alleged in Paragraph 4 of the Complaint.

4. Defendants admit the allegations of Paragraph 5

of the Complaint.

5. Defendants admit that the Defendants, Stuart, Guedon, Cupit and Killingsworth are Members of the Board of Education of Jefferson County, Mississippi, but deny that the Defendant; Ellis, is a member of said board. They admit that they have certain power and duties under Sections 6271-08 and 6252-0, et seq., of the Mississippi Code and submit that said sections speak for themselves.

Defendants admit that the Defendants Bullen, Ball, and Cupit are Members of the County Election Commission of Jefferson County and, as such, have general supervision of general elections in Jefferson County, all as alleged in Paragraph 6(b) of the Complaint.

6. Defendants admit that each county in Mississippi, including Jefferson County, has a public school system governed in certain respects by the County Superintendent of Education. They are without information sufficient to form a belief as to the truth of the averments of the second and third sentences of Paragraph 7 of the Complaint.

7. Defendants admit the allegations of Paragraph 8 of the Complaint.

8. Defendants admit the allegations of Paragraph 9 of the Complaint.

9. Defendants deny the allegations of Paragraph 10 of the Complaint.

10. Defendants admit the allegations of Paragraphs 11(a) and (b) of the Complaint. All other allegations of Paragraph 11 are denied.

11. For their answer to Paragraph 12 of the Complaint, the Defendants re-aver each and every part of their answer to Paragraphs 7 through 8 of the Complaint.

12. Defendants deny the allegations of Paragraph 13 of the Complaint, including subparagraphs a, b, and c, thereof.

13. Defendants deny the allegations of Paragraph 14 of the Complaint.

Further answering the Complaint, Defendants deny that Plaintiffs are entitled to any relief in this action and allege that this action should be dismissed at the cost of Plaintiffs.

CORBAN AND CORBAN
ROBERT L. CORBAN
SPECIAL COUNSEL
FAYETTE, MISSISSIPPI

JOE T. PATTERSON,
ATTORNEY GENERAL OF
THE STATE OF MISSISSIPPI

WILL S. WELLS,
ASSISTANT ATTORNEY GENERAL
OF THE STATE OF MISSISSIPPI

Attorneys for Defendants
BY:
WILL S. WELLS
Of Counsel

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Answer of Defendants have been mailed via United States Mail, postage prepaid, to Honorable L. Lackey Rowe, Jr., 233 North Farish Street, Jackson, Mississippi, one of the attorneys of record for plaintiffs.

DONE, this the 22nd day of September, 1967.

S/ Will S. Wells
WILL S. WELLS
ASSISTANT ATTORNEY GENERAL OF
THE STATE OF MISSISSIPPI

ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 4148J

JOE T. PATTERSON, et al.
Defendants.

SETH BALLARD, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1200 W

JOE T. PATTERSON, et al.,
Defendants.

J.C. FAIRLEY, et al.
Plaintiff,

vs.

CIVIL ACTION
No. 2205 H

JOE T. PATTERSON, et al.
Defendants.

LEVI MARSAW, III, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1201 W

JOE T. PATTERSON, et al.
Defendants.

CHARLES E. BUNTON, et al.
Plaintiffs,

vs.

CIVIL ACTION
No.1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed: Sept. 15, 1967)

MOTION FOR SUBSTITUTION OF PARTIES AND DROPPING AND ADDING PARTIES, FOR DISMISSAL OF CERTAIN CLAIMS FOR RELIEF, AND FOR DEFAULT JUDGMENT

Plaintiffs in each of the above styled actions, by their attorneys, respectfully move this Court:

1. In Civil Action No. 4148 J:

(a) To substitute Ed William Moses as a party defendant in lieu of defendant Mrs. Mabel D. Henrich, on the ground that Mrs. Mabel D. Henrich is no longer a Holmes County Election Commissioner and Ed William Moses has been appointed as Election Commissioner in her place.

(b) To dismiss plaintiffs' second for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

(c) For a default judgment against Joe T.

Patterson, Attorney General of the State of Mississippi, on the ground that he has neither appeared nor answered within the time set for doing so by Rule 12(a) of the Federal Rules of Civil Procedure.

2. In Civil Action No. 1200 W:

(a) To substitute Robert Lee Williams as a party defendant in lieu of defendant Iler K. Ellis, on the ground that Iler K. Ellis is no longer a member of the Jefferson County Board of Education and Robert Lee Williams has assumed his place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

3. In Civil Action No. 2205 H:

(a) To substitute Mrs. Fred Blackwell as a party defendant in lieu of defendant Mrs. Mary E. Pon, on the ground that Mrs. Mary E. Pon is no longer a Forrest County Election Commissioner and Mrs. Fred Blackwell has assumed her place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

4. In Civil Action No. 1201 W:

(a) To substitute Alma D. Maddox as a party defendant in lieu of defendant Paul Keller, on the ground that Paul Keller is deceased and his place as an Adams County Election Commissioner has been assumed by Alma D. Maddox.

(b) To drop the plaintiff Majorie Baroni and add in her place as a named plaintiff, Mami L. Mazique, on the ground that Majorie Baroni is a member of the Caucasian race and Mamie L. Mazique is a member of the Negro race and desires to join in this suit.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do no wish to pursue said claim for relief.

5. In Civil Action No. 1204 W:

(a) To substitute Ethan Porter as a party defendant in lieu of defendant William Smith, on the ground that William Smith is no longer a member of the Board of Education of Claiborne County, and Ethan Porter has assumed his place.

(b) To substitute Orin R. Segrest, Jr. as a party defendant in lieu of defendant Robert Vaughn, on the ground that Robert Vaughn is no longer an Election Commissioner for Claiborne County and Orin R. Segrest, Jr., has assumed his place.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to

and further on the ground that plaintiffs do not wish to pursue said claim for relief.

Dated: September 14, 1967

Respectfully submitted,

S/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

To:

Joe T. Patterson, Esq.
Will S. Wells, Esq.
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Jackson, Mississippi

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Robert L. Corban, Esq.
Fayette, Mississippi

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Durant, Mississippi

R. A. Gray, Jr., Esq.
Gray & Montague
201-05 Carter Building
P. O. Box 1288
Hattiesburg, Mississippi

J. T. Drake, Esq.
P. O. Box 366
Port Gibson, Mississippi

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and for Default Judgment is noticed for hearing on September 25, 1967, at 9:00 A.M., or as soon thereafter as counsel can be heard, before the Honorable Dan M. Russell, Jr., United States District Judge, in the United States Courthouse in Jackson, Mississippi.

Dated: September 14, 1967.

Respectfully submitted,

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and For Default Judgment and a copy of the foregoing Notice of Motion have been mailed this date, postage prepaid, to Joe T. Patterson, Esq., Will S. Wells, Esq., William A. Allain, Esq., Office of the Attorney General, New Capitol Building, Jackson Mississippi; Corban & Corban, Robert L. Corban, Esq., Fayette, Mississippi; B. C. Callon, Esq., P. O. Box 1315, Natchez, Mississippi; Calvin R. King, Esq., P. O. Drawer 392, Durant, Mississippi, R. A. Gray, Jr., Esq., Gray & Montague, 201-05 Carter Building, P. O. Box 1288, Hattiesburg, Mississippi and J. T. Drake, Esq., P. O. Box 366, Port Gibson, Mississippi.

Dated: September 14, 1967

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 4148J

JOE T. PATTERSON, et al.
Defendants.

SETH BALLARD, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1200 W

JOE T. PATTERSON, et al.,
Defendants.

J.C. FAIRLEY, et al.
Plaintiff,

vs.

CIVIL ACTION
No. 2205 H

JOE T. PATTERSON, et al.
Defendants.

LEVI MARSAW, III, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1201 W

JOE T. PATTERSON, et al.
Defendants.

CHARLES E. BUNTON, et al.
Plaintiffs,

vs.

CIVIL ACTION
No.1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed: Sept. 28, 1967)

ORDER

It appearing that the Order entered on September 25, 1967, in Civil Action Number 4148J, 1200W and 1204W should be clarified to make plain the intention of the Court,

IT IS ORDERED, that the same be and they are hereby amended to read as follows:

In Civil Action No. 4148J, Ed William Moses is, hereby, added as a party-defendant; The Complaint is dismissed as to the defendant Mrs. Mabel D. Henrich; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.,

In Civil Action Number 1200W, Robert Lee Williams is, hereby, added as a party-defendant; The Complaint is dismissed as to Iler K. Ellis; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.

In Civil Action No. 1204W, Ethan Porter is, hereby, added as a party-defendant; The Complaint is dismissed as to the defendant, William Smith; Orin R. Segrest, Jr., is,

hereby, added as a party-defendant; The Complaint is dismissed as to the Defendant Robert Vaughn; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.

ORDERED, this the 28th day of September, 1967.

S/Harold Cox
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

SETH BALLARD, ET AL
PLAINTIFFS

VS.

CIVIL ACTION
NO.1200 W

JOE T. PATTERSON, ET AL
DEFENDANTS

(Filed Oct. 8, 1967)

ORDER

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether or not Section 6271-08 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 6271-08 as amended by the legislature of Mississippi at its regular session of 1966 does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C.,

and that plaintiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in this action be, and the same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

S/ Harold Cox
UNITED STATES DISTRICT JUDGE
Acting For and on Behalf of The Court

A TRUE COPY, I HEREBY CERTIFY.
ROBERT C. THOMAS, CLERK
BY:
S/ Ruby L. Short
Deputy Clerk
Dated: 10/8/67

Civil Docket No. 4148

7-14-67 Complaint, original and nine copies, filed.

8-17-67 Answer of Defendants, Members of The Board of Education of Holmes County, filed. Copies of Answer mailed to Judges Cox, Coleman and Russell.

9-15-67 Plaintiff's motion for substitution of parties and dropping and adding parties, for dismissal of certain claims for relief, and for default judgment, with notice of motion for 9-25-67 at Jackson, Miss., and certificate of service, filed. Copies mailed to Judges Cox, Coleman and Russell. Copies mailed to Vicksburg and Hattiesburg for docketing and filing.

9-28-67 ORDER: it appearing that the Order entered on 9-25-67 and filed 9-26-67 should be clarified to make plain the intention of the Court, ordered that said order is amended to read as follows: In Civil Action No. 4148, Ed William Moses is, hereby added as a party defendant; The Complaint is dismissed as to the Defendant Mrs. Mabel D. Henrich; Plaintiffs' second claim for relief is, hereby dismissed without prejudice, filed and entered OB, 1967, Pages 906 & 907. (Copies mailed three judges and attorneys)

10-5-67 ORDER Opinion of the Court that plaintiffs are entitled to no relief and injunction prayed for denied and complaint is dismissed at the cost of the plaintiffs, filed and entered OB 1967 pages 947 and 948. Copies mailed three judges and attorneys.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

VERNON TOM GRIFFIN, ROBERT COOPER HOWARD, CORNELIUS BROOKS, LUCAS SIMS, ED McGRAW, JR., THOMAS G. JOHNSON, and JOHN LOVIE, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-vs-

CIVIL ACTION
NO. 4148

JOE T. PATTERSON, Attorney General of the State of Mississippi; W. B. KENNA, W. H. McKENZIE, JR., HOMER E. CHISHOLM, M. L. SMITH and JAMES BARRETT, as members of the Board of Education of Holmes County; MRS. HATTIE MAUDE FARMER, ED WILLIAM MOSES and MRS. JULIETTE GARLAND, as County Election Commissioners for Holmes County,

Defendants.

COMPLAINT

1. This action arises under the Voting Rights Act of 1965 (Title 42 U.S.C. Section 1973), Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. Section 1971. It seeks a declaratory judgment that Section 6271-08 of the Mississippi Code, as amended, is violative of said Voting Rights Act, Fourteenth and Fifteenth Amendments and 42 U.S.C. Section 1971, and preliminary and permanent injunctions against the application and enforcement of said Section 6271-08 by the Board of Education of Holmes County, Mississippi, and against the appointment of the Superintendent of Education for Holmes County by the Board of Education of Holmes County pursuant to or in accordance with the provisions of Section 6271-08.

2. Jurisdiction is conferred on this Court by Title 28 U.S.C. §§ 1343(3) and (4), 2201 and 2202, and by Title U.S.C. §§ 1971 (d) and 1973(j)(f). A district court of three judges is required to be convened by Title 28 U.S.C. Section 2281 and Title 43 U.S.C. Section 1973c.

3. Plaintiffs are all adult Negro citizens of Mississippi and of the United States, and are citizens, residents and qualified electors of Holmes County, Mississippi.

4. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated as qualified electors of Holmes County and as potential candidates for Superintendent of Education of Holmes County, pursuant to Rule 23 of the Federal Rules of Civil Procedure. As to the classes: (1) they are so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the classes; (3) the claims of the plaintiffs are typical of the claims of the classes; (4) plaintiffs will fairly and adequately protect the interests of the classes; and (5) defendants have acted and will act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the classes as a whole.

5. Defendant Joe T. Patterson is Attorney General of the State of Mississippi.

6. (a) Defendants Kenna, McKenzie, Chisholm, Smith and Barrett are members of the Board of Education of Holmes County, as such, have the power under the amended version of Section 6271-08 of the Mississippi Code, to appoint the

County Superintendent of Education for Holmes County, which Superintendent would have the power and the duty to supervise the public schools to comply with the various laws relating thereto, pursuant to Sections 6252-01 *et seq.* of the Mississippi Code.

(b) Defendants Farmer, Henrich and Garland are the County Election Commissioners for Holmes County and, as such, supervise and administer all general elections in Holmes County pursuant to Sections 3204 *et seq.* of the Mississippi Code.

FIRST CLAIM FOR RELIEF

7. Each county in Mississippi, including Holmes County, has a public school system governed in certain respects by the County Superintendent of Education. Prior to and on November 1, 1964, and up until the date referred to in paragraph 8 hereof, every county in Mississippi except one elected its Superintendent of Education unless it held a special election pursuant to statute to make such post appointive. (Mississippi Code Section 6171-08) Holmes County has always elected its County Superintendent of Education.

8. Effective June 17, 1966, the Legislature of Mississippi with the approval of Governor Paul B. Johnson, amended the aforesaid Section 6271-08 to provide that in certain described counties, the Superintendent of Education must be appointed rather than elected. Specifically, Section 6271-08, as herein relevant, before amendment read:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such

election at three (3) public places in such county, one of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided."

Following its amendment in 1966, Section 6271-08, as herein relevant, reads:

> "(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the Board of supervisors of such county, within sixty (60) days after the filing of such petition to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective of shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class Three county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county, the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less

than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the

term of the county superintendent of education in the office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U.S. Highways 49 and 51, and State Highways 16, 17 and 43 and the Natchez Trace; in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U.S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect; in any county created after 1916 through which the Yazoo River flows; in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a landgrant institution or lands contiguous thereto owned by the institution; in any county lying

within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960; in any county having a population of twenty-six thousand seven hundred fifty-nine (26,759) according to the 1960 Federal census, and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect; in any Class Three county wherein is partially located a national forest and wherein U.S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00; the county superintendent of education hereafter shall be appointed by the county board of education.

"In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972." (Emphasis added. Underlined portion is description fitting Jefferson County).

9. The Voting Rights Act of 1965 (42 U.S.C. 1973) is applicable to the State of Mississippi. That Act provides in Section 5 that whenever a State, or political subdivision thereof:

> "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964"

the State or subdivision cannot enforce such new qualification prerequisite, standard, practice or procedure unless and until it either:

> (a) institutes an action in the United States District Court for the District of Columbia, and said court enters a declaratory judgment that such qualification, prerequisite, standard, practice, or provedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color; or
>
> (b) submits such qualification, prerequisite, standard, practice, or procedure to the Attorney General of the United States and the Attorney General does not interpose an objection within 60 days after such submission.

10. The amendment to Section 6271-08 as described in paragraph eight (8) hereof is such a change in qualification, prerequisite, standard, practice, or procedure as is referred to in Section 5 of the Voting Rights Act of 1965.

11. Neither the State of Mississippi, nor any of its officials, nor Holmes County, Mississippi, nor any of its officials has:

(a) instituted any action in the United States District Court for the District of Columbia for a declaratory judgment that Section 6271-08 of the Mississippi Code, as amended, does not have the effect of, denying or abridging the right to vote on account of race or color, nor

(b) submitted said amended section of the Code to the Attorney General of the United States for his approval.

Inasmuch as the enactment of the amendment to Section 6271-08 of the Mississippi Code by the State of Mississippi is in violation of the requirements of Section 5 of the Voting Rights Act of 1965, said enactment is void and of no legal force or effect. Plaintiffs have no adequate remedy at law and unless the relief requested herein is granted, plaintiffs will suffer irreparable harm in that their rights and the rights of the classes they represent to vote and run for public office will be denied and abridged in violation of Title 42 U.S.C. § 1973.

SECOND CLAIM FOR RELIEF

12. Plaintiffs reaver each and every averment contained in paragraphs 7 through 8 hereof.

13. The amendment to Section 6271-08 of the

Mississippi Code, as described in paragraph 8 hereof has the purpose and effect of:

(a) denying or abridging, on account of race or color, the votes of the individual plaintiffs and the classes they represent;

(b) preventing the election of Negro candidates to the office of County Superintendent of Education by making said office appointive in those specially designated counties in Section 6271-08, such as Holmes County, which have Negro voting majorities; and

(c) preventing potential Negro candidates to the office of County Superintendent of Education from holding that office by election or appointment as white county boards of education, such as that in Holmes County, elected at a time when Negroes were largely denied the right to vote on account of race or color, are not likely seriously to consider the appointment of qualified Negroes to the office of County Superintendent of education, thus denying or abridging, on account of race or color, the right of those persons to participate in Government as officeholders.

14. For the reasons stated in paragraph 13 above, Section 6271-08 of the Mississippi Code, as amended, violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S. C. §§1971 and 1973.

WHEREFORE, plaintiffs pray that:

1. Pursuant to the provisions of 28 U.S.C. § 2281 and 2283 and 42 U.S.C. § 1973c, a district court of three judges be convened.

2. This Court declare that Section 6271-08 of the Mississippi Code, as amended, and also as applied in Holmes County, is in violation of the Voting Rights Act of 1965 (Title 42 U.S.C. § 1973), the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1971, and therefore void.

3. This Court issue preliminary and permanent injunctions enjoining defendants, their agents, employees, successors and all persons in active concert and participation with them from enforcing, implementing or otherwise giving effect to Section 6271-08 of the Mississippi Code, as amended, in any way whatsoever.

4. This Court enjoin the appointment of the Superintendent of Education of Holmes County unless and until appointment is authorized by the voters of the county pursuant to Section 6271-08 prior to its amendment as aforesaid, or until Section 5 of the Voting Rights Act of 1965 is complied with by defendants.

5. This Court order the defendants, their agents, employees, successors, and all persons in active concert and participation with them to hold elections for Holmes County Superintendent of Education on November 7, 1967.

6. This Court retain jurisdiction of this cause.

7. This Court grant plaintiffs such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

Dated: July 12, 1967

Respectfully submitted,

S/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
223 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

VERNON TOM GRIFFIN, ROBERT COOPER HOWARD, CORNELIUS BROOKS, LUCAS SIMS, ED McGRAW, JR., of themselves and all other persons similarly situated,

Plaintiffs,

-vs-

CIVIL ACTION
NO. 4148

JOE T. PATTERSON, Attorney General of the State of Mississippi; W. B. KENNA, W. H. McKENZIE, JR., HOMER E. CHISHOLM, M. L. SMITH and JAMES BARRETT, as members of the Board of Education of Holmes County; MRS. HATTIE MAULE FARMER, MRS. MABEL D. HENRICH and MRS. JULIETTE GARLAND, as County Election Commissioners for Holmes County,

Defendants.

ANSWER OF DEFENDANTS, MEMBERS OF THE BOARD OF EDUCATION OF HOLMES COUNTY

The Defendants, W. B. Kenna, W. H. McKenzie, Jr., Homer E. Chisholm, M. L. Smith and James Barrett, members of the Board of Education of Holmes County, answering the Complaint, by their attorney, allege:

1. Defendants deny the allegations contained in paragraph one of the Complaint, except they admit that Plaintiffs are seeking the relief as stated in said paragraph.

2. Defendants admit the allegations of paragraph two of the Complaint.

3. Defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of paragraph three of the Complaint.

4. Defendants deny the allegations contained in paragraph four of the Complaint.

5. Defendants admit the allegations of paragraph five of the Complaint.

6. Defendants admit the allegations of paragraph six (a) of the Complaint.

7. Defendants admit the allegations of paragraph seven of the Complaint.

8. Defendants admit the allegations of paragraph eight of the Complaint.

9. Defendants admit the allegations of paragraph nine of the Complaint, except Defendants deny that the Voting Rights Act of 1965 is applicable to the issues in this cause.

10. The Defendants deny the allegations of paragraph ten of the Complaint.

11. The Defendants deny the allegations of paragraph eleven of the Complaint, except they admit that they have not followed the procedures as set forth in subsections (a) and (b) paragraph eleven of the Complaint.

12. Defendants restate by reference their admissions and denials contained in paragraph seven through eight of the Complaint, and reavered in paragraph twelve of the Complaint.

13. The Defendants deny the allegations of paragraph thirteen of the Complaint.

14. The Defendants deny and refute the allegations of paragraph fourteen of the Complaint.

15. The Defendants deny that the Plaintiffs are entitled to any of the relief prayed for in the Complaint and specifically deny that Plaintiffs are entitled to any of the relief sought in paragraphs one, two, three, four, five, six or seven of the prayer to the Complaint

Dated: August 16, 1967

Respectfully submitted,

S/ Calvin R. King
Calvin R. King
P. O. Drawer 392
Durant, Mississippi,
Attorney for Defendants,
members of the Board of
Education of Holmes County.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 4148J

JOE T. PATTERSON, et al.
Defendants.

SETH BALLARD, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1200 W

JOE T. PATTERSON, et al.,
Defendants.

J.C. FAIRLEY, et al.
Plaintiff,

vs.

CIVIL ACTION
No. 2205 H

JOE T. PATTERSON, et al.
Defendants.

LEVI MARSAW, III, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1201 W

JOE T. PATTERSON, et al.
Defendants.

CHARLES E. BUNTON, et al.
Plaintiffs,

vs.

CIVIL ACTION
No.1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed Sept., 15, 1967)

MOTION FOR SUBSTITUTION OF PARTIES AND DROPPING AND ADDING PARTIES, FOR DISMISSAL OF CERTAIN CLAIMS FOR RELIEF, AND FOR DEFAULT JUDGMENT

Plaintiffs in each of the above styled actions, by their attorneys, respectfully move this Court:

1. In Civil Action No. 4148 J:

(a) To substitute Ed William Moses as a party defendant in lieu of defendant Mrs. Mabel D. Henrich, on the ground that Mrs. Mabel D. Henrich is no longer a Holmes County Election Commissioner and Ed William Moses has been appointed as Election Commissioner in her place.

(b) To dismiss plaintiffs' second for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

(c) For a default judgment against Joe T.

Patterson, Attorney General of the State of Mississippi, on the ground that he has neither appeared nor answered within the time set for doing so by Rule 12(a) of the Federal Rules of Civil Procedure.

2. In Civil Action No. 1200 W:

(a) To substitute Robert Lee Williams as a party defendant in lieu of defendant Iler K. Ellis, on the ground that Iler K. Ellis is no longer a member of the Jefferson County Board of Education and Robert Lee Williams has assumed his place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

3. In Civil Action No. 2205 H:

(a) To substitute Mrs. Fred Blackwell as a party defendant in lieu of defendant Mrs. Mary E. Pon, on the ground that Mrs. Mary E. Pon is no longer a Forrest County Election Commissioner and Mrs. Fred Blackwell has assumed her place.

(b) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do not wish to pursue said claim for relief.

4. In Civil Action No. 1201 W:

(a) To substitute Alma D. Maddox as a party defendant in lieu of defendant Paul Keller, on the ground that Paul Keller is deceased and his place as an Adams County Election Commissioner has been assumed by Alma D. Maddox.

(b) To drop the plaintiff Majorie Baroni and add in her place as a named plaintiff, Mami L. Mazique, on the ground that Majorie Baroni is a member of the Caucasian race and Mamie L. Mazique is a member of the Negro race and desires to join in this suit.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof and further on the ground that plaintiffs do no wish to pursue said claim for relief.

5. In Civil Action No. 1204 W:

(a) To substitute Ethan Porter as a party defendant in lieu of defendant William Smith, on the ground that William Smith is no longer a member of the Board of Education of Claiborne County, and Ethan Porter has assumed his place.

(b) To substitute Orin R. Segrest, Jr. as a party defendant in lieu of defendant Robert Vaughn, on the ground that Robert Vaughn is no longer an Election Commissioner for Claiborne County and Orin R. Segrest, Jr., has assumed his place.

(c) To dismiss plaintiffs' second claim for relief on the ground that this Court has no jurisdiction thereof

and further on the ground that plaintiffs do not wish to pursue said claim for relief.

Dated: September 14, 1967

Respectfully submitted,

S/ L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

To:

Joe T. Patterson, Esq.
Will S. Wells, Esq.
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Durant, Mississippi

R. A. Gray, Jr., Esq.
Gray & Montague
201-05 Carter Building
P. O. Box 1288
Hattiesburg, Mississippi

J. T. Drake, Esq.
P. O. Box 366
Port Gibson, Mississippi

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and for Default Judgment is noticed for hearing on September 25, 1967, at 9:00 A.M., or as soon thereafter as counsel can be heard, before the Honorable Dan M. Russell, Jr., United States District Judge, in the United States Courthouse in Jackson, Mississippi.

Dated: September 14, 1967.

Respectfully submitted,

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Substitution of Parties and Dropping and Adding Parties, for Dismissal of Certain Claims for Relief, and For Default Judgment and a copy of the foregoing Notice of Motion have been mailed this date, postage prepaid, to Joe T. Patterson, Esq., Will S. Wells, Esq., William A. Allain, Esq., Office of the Attorney General, New Capitol Building, Jackson Mississippi; Corban & Corban, Robert L. Corban, Esq., Fayette, Mississippi; B. C. Callon, Esq., P. O. Box 1315, Natchez, Mississippi; Calvin R. King, Esq., P. O. Drawer 392, Durant, Mississippi; R. A. Gray, Jr., Esq., Gray & Montague, 201-05 Carter Building, P. O. Box 1288, Hattiesburg, Mississippi and J. T. Drake, Esq., P. O. Box 366, Port Gibson, Mississippi.

Dated: September 14, 1967

S/L. Lackey Rowe, Jr.
L. LACKEY ROWE, JR.
DENISON RAY
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

VERNON TOM GRIFFIN, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 4148J

JOE T. PATTERSON, et al.
Defendants.

SETH BALLARD, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1200 W

JOE T. PATTERSON, et al.,
Defendants.

J.C. FAIRLEY, et al.
Plaintiff,

vs.

CIVIL ACTION
No. 2205 H

JOE T. PATTERSON, et al.
Defendants.

LEVI MARSAW, III, et al.
Plaintiffs,

vs.

CIVIL ACTION
No. 1201 W

JOE T. PATTERSON, et al.
Defendants.

CHARLES E. BUNTON, et al.
Plaintiffs,

vs.

CIVIL ACTION
No.1204 W

JOE T. PATTERSON, et al.
Defendants.

(Filed: Sept. 28, 1967)

ORDER

It appearing that the Order entered on September 25, 1967, in Civil Action Number 4148J, 1200W and 1204W should be clarified to make plain the intention of the Court,

IT IS ORDERED, that the same be and they are hereby amended to read as follows:

In Civil Action No. 4148J, Ed William Moses is, hereby, added as a party-defendant; The Complaint is dismissed as to the defendant Mrs. Mabel D. Henrich; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.

In Civil Action Number 1200W, Robert Lee Williams is, hereby, added as a party-defendant; The Complaint is dismissed as to Iler K. Ellis; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.

In Civil Action No. 1204W, Ethan Porter is, hereby, added as a party-defendant; The Complaint is dismissed as to the defendant, William Smith; Orin R. Segrest, Jr., is,

hereby, added as a party-defendant; The Complaint is dismissed as to the Defendant Robert Vaughn; Plaintiffs' second claim for relief is, hereby, dismissed without prejudice.

ORDERED, this the 28th day of September, 1967.

S/Harold Cox
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

VERNON TOM GRIFFIN, ET AL
PLAINTIFFS

VS.

CIVIL ACTION
NO. 4148J

JOE T. PATTERSON, ET AL
DEFENDANTS

(Filed Oct. 8, 1967)

ORDER

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether or not Section 6271-08 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 6271-08 as amended by the legislature of Mississippi at its regular session of 1966 does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C., and that plaintiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in this action be, and the same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

S/ Harold Cox
UNITED STATES DISTRICT JUDGE
Acting For and on Behalf of The Court

A TRUE COPY, I HEREBY CERTIFY.
ROBERT C. THOMAS, CLERK
BY:
S/ Ruby L. Short
Deputy Clerk
Dated: 10/8/67

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 36

CLIFTON WHITLEY, ET AL., *Appellants*,

v.

JOHN BELL WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (THREE JUDGE COURT)

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APPENDIX

Relevant Docket Entries in Proceeding Below

10-20-66—Complaint, original and six copies, filed.

• • • • • • • • • • •

10-26-66—Answer of defendants with certificate of service—filed. Copies of answer handed to each of the 3 judges at Biloxi.

10-26-66—Per Curiam opinion—"An order accordingly may be presented.", filed.

• • • • • • • • • • •

10-27-66—ORDER granting temporary injunction, filed and entered OB 1966, Pages 866 and 867.

• • • • • • • • • • •

9-25-67—Stipulation as to House Bill 68, Mississippi Laws 1966, amending Section 3260; Mississippi Code 1942, filed. Copies of stipulation mailed to Judges Ainsworth, Cox & Russell.

10-13-67—Plaintiff's Notice of Motion on 10-20-67 at Jackson, Miss., with Motion for interlocutory injunction and Certificate of service with affidavit attached, filed.

10-27-67—OPINION before Ainsworth, Circuit Judge, and Cox and Russell, District Judges: "The motion for an interlocutory injunction is accordingly denied, and the complaint in its entirety is without merit and is dismissed; The judgment incorporating this per curiam opinion by reference thereto may be presented and signed by the managing judge of this Court as the order of the entire Court," filed. Copies transmitted to attorneys and three judges.

10-31-67—FINAL JUDGMENT: Plaintiffs' motion for an interlocutory injunction is denied, and the complaint herein in its entirety, be and is hereby, dismissed,

filed and entered OB 1967, Page 1022. (Copy mailed attorney Will S. Wells)

10-31-67—Plaintiffs' Notice of Appeal to the Supreme Court of the United States from Final Judgment of 10-31-67, with certificate of service, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

REV. CLIFTON WHITLEY, DOCK DRUMMOND, and EMMA SANDERS, on behalf of themselves and all other persons similarly situated, *Plaintiffs*

v.

PAUL B. JOHNSON, as Governor of the State of Mississippi and Chairman of the State Board of Election Commissioners; HEBER LADNER, as Secretary of State of the State of Mississippi and Secretary of the State Board of Election Commissioners and JOE T. PATTERSON, Attorney General of the State of Mississippi and member of the State Board of Election Commissioners, *Defendants*

Complaint—Filed October 20, 1966

1. This action arises under the 14th and 15th Amendments to the Constitution of the United States and the Voting Rights Act of 1965 (Title 42 U.S.C. § 1973). It seeks to enjoin, as violative of the Constitution and laws of the United States, enforcement of Chapter 613 of the Mississippi Laws of 1966 (House Bill No. 68) purporting to amend Section 3260, Mississippi Code of 1942, insofar as said Chapter 613 seeks to make more stringent the requirements for independent candidacy in the State of Mississippi.

2. The jurisdiction of this Court is founded on Title 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201 and 2281, and on Title 42 U.S.C. §§ 1971(d), 1973(j)(f), 1981 and 1983. The matter in controversy exceeds the value of $10,000.00 exclusive of interest and costs.

3. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated pursuant to Rule 23 FRCP. The persons constituting the class represented herein are so numerous as to make it impracticable to bring them all before the Court. Plaintiffs fairly insure the adequate representation of all. The character of the right sought to be enforced for the class is several; there are common questions of law and fact affecting the several rights, and a common relief is sought.

4. Plaintiffs are Negro citizens of the United States and the State of Mississippi and each is a qualified elector in the State of Mississippi. Plaintiff, Rev. Clifton Whitley, is in every respect qualified to be an independent candidate for the office of United States Senator from the State of Mississippi in the November 8, 1966 general election. He resides in Marshall County, Mississippi and on September 27, 1966, he filed a valid petition for said office with the Secretary of State of the State of Mississippi in accordance with law. His petition contained 3,540 signatures, of which 2,055 were certified as valid by the appropriate county registrars. Plaintiff Dock Drummond is in every respect qualified to be an independent candidate for the office of Representative to the United States Congress for the First Congressional District of Mississippi. He resides in Attala County, Mississippi and on September 28, 1966, he filed a valid petition for said office with the Secretary of State of the State of Mississippi in accordance with law. His petition contained 537 signatures of which 449 were certified as valid by the appropriate county registrars. Plaintiff Emma Sanders is in every respect qualified to be a candidate for the office of Representative to the United States Congress for the Third Congressional

District of Mississippi. She resides in Hinds County and on September 29, 1966, she filed a valid petition for said office with the Secretary of State of the State of Mississippi in accordance with law. Her petition contained 386 signatures of which 218 were certified as valid by the appropriate county registrars.

5. Defendant Paul B. Johnson is the Governor of the State of Mississippi and Chairman of the State Board of Election Commissioners, which Board has general overall responsibility for the conduct of all elections in the State of Mississippi.

Defendant Joe T. Patterson is the Attorney General of the State of Mississippi and a member of the State Board of Election Commissioners.

Defendant Heber Ladner is the Secretary of State of the State of Mississippi and Secretary of the State Board of Election Commissioners of the State of Mississippi.

6. On or about the 10th day of October, 1966 the defendants, acting in their official capacities, rejected the petitions filed by the plaintiffs as aforesaid on the grounds that said petitions did not comply with the provisions of said Chapter 613, and more particularly, that the petitions of the plaintiffs did not contain the number of signatures of qualified electors required by Section 3260 as it purported to have been amended by said Chapter 613. However, the defendants have admitted that each of the said petitions contained a sufficient number of valid signatures to comply with the requirements of Section 3260 if said Chapter 613 did not validly amend Section 3260.

7. Section 3260, prior to its purported amendment by said Chapter 613 provided, *inter alia*, that a petition by an independent candidate for an office elected by the state at large was required to be signed by not less than 1,000 qualified electors. Said law also provided that the petition of an independent candidate for an office elected

by the qualified electors of a congressional district must be signed by not less than 200 qualified electors. Said Chapter 613, which was passed in the Regular Session of the 1966 Mississippi Legislature and approved by the Governor on June 15, 1966, purported to change the aforesaid requirements of Section 3260 in material part as follows:

> "For an office elected by the State at large, not less than ten thousand (10,000) qualified electors; . . . for an office elected by the qualified electors of a congressional district not less than two thousand (2,000) qualified electors. . . ."

8. Nothing in Section 3260, before or after its purported Amendment by Chapter 613, prohibits a person from qualifying as an independent candidate in the general election, if he has participated as a candidate in a primary election.

9. Candidates for the offices of United States Senator and United States House of Representatives from the State of Mississippi who are nominated by the regular Democratic and Republican parties of the State of Mississippi in their respective primaries need not file any petitions in order to run in the general election. The present nominees for the aforesaid respective offices by the regular Democratic and Republican parties are white. No Negro has been nominated by the regular political parties of the State of Mississippi for the aforesaid offices since prior to 1900.

10. The present members of the State Board of Election Commissioners are white and the past members since prior to 1900 have been white. White political supremacy has prevailed in the State of Mississippi during the entire history of the State.

11. (a) The population of the State of Mississippi, as appears from the 1960 census of the United States Gov-

ernment, consists of approximately 2,178,141 persons of whom 915,743 or 42% are members of the Negro race.

(b) Upon information and belief, so effective and complete has been the program of disfranchisement of the Negro people of the State of Mississippi that as of November of 1964, the date of the last general election of federal elective officials, less than 7% of eligible Negroes were registered to vote in the State. Upon information and belief, at the same time, over 60% of the eligible whites were registered to vote in the State of Mississippi.

12. On numerous occasions in the past 10 years the United States District Courts in the State of Mississippi and the United States Court of Appeals for the Fifth Circuit have entered decrees and judgments based on findings of long-standing patterns and practices of racial discrimination in connection with voting in various counties of the State of Mississippi.

13. As of July 1, 1966, approximately 34% of the eligible Negroes were registered to vote in the State of Mississippi. Thus, for the first time in this century, a substantial proportion of the Negro electorate is in a position to vote in a general election of federal elective officials.

14. The defendants acting pursuant to said Chapter 613, have refused to permit the plaintiffs to qualify and run for their respective offices in the general election for 1966.

15. The purpose and effect of the adoption of said Chapter 613 is to abridge, on account of race or color, the right of the plaintiffs to run as independent candidates in the November, 1966 general election and in elections thereafter, and further to abridge, on account of race or color, the right of Negroes in the State of Mississippi to vote for the candidates of their choice.

16. The State of Mississippi is one of the areas covered by the provisions and requirements of the Voting Rights Act of 1965. Neither the State of Mississippi nor any

of its officials or agents has instituted any action in the United States District Court for the District of Columbia for declaratory judgment that said Chapter 613 does not have the purpose and will not have the effect of denying or abridging the right to vote, on account of race or color; nor have they submitted said Chapter 613 to the Attorney General of the United States in accordance with the requirements of Section 5 of the Voting Rights Act of 1965.

17. The said Chapter 613, and the effect given to it by the defendants, violates 42 U.S.C. § 1971(a), Section 5 of the Voting Rights Act of 1965 and the 14th and 15th Amendments to the Constitution of the United States.

18. The further effect of said Chapter 613 is to "freeze" Negroes out of the electorate and therefore violates the 15th Amendment to the United States Constitution.

19. The purpose and effect of said Chapter 613 is to perpetuate the white political supremacy that has prevailed in the State of Mississippi since prior to 1900.

20. Unless restrained by order of this Court, defendants will continue to give effect to said Chapter 613 and will fail and refuse to accept the qualified petitions of the plaintiffs for the forthcoming general election on November 8, 1966, and the plaintiffs will be irreparably injured.

21. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for a preliminary and permanent injunction is their only means of securing adequate relief.

WHEREFORE, plaintiffs pray:

1. That pursuant to the provisions of 28 U.S.C. § 2281, a district court of three judges be convened in accordance with the procedures set forth in 28 U.S.C. § 2284;

2. That this Court adjudge and declare said Chapter 613 to be in violation of 42 U.S.C. § 1971(a), Section 5 of the Voting Rights Act of 1965 and the 14th and 15th Amendments to the Constitution of the United States;

3. That this Court issue a preliminary and permanent injunction enjoining the defendants, their agents, employees, successors and all persons in active concert and participation with them from:

(a) enforcing or otherwise giving any legal effect to Chapter 613;

(b) failing or refusing to accept the petition as independent candidates, of the plaintiffs, and all others similarly situated for their respective offices in the November 8, 1966 general election;

(c) failing or refusing to include the names of the plaintiffs, and all other similarly situated as candidates who qualify on the official ballots for said general election on November 8, 1966.

4. That pending the hearing and determination of the complaint herein and the request for relief thereunder, a temporary injunction issue enjoining and restricting the defendants, each of them, their agents, representatives and attorneys, and all others acting in concert with them from proceeding in any way with or from holding the general elections now scheduled for November 8, 1966;

5. That this Court grant such additional relief as justice may require together with the costs and disbursements of this action.

Respectfully submitted,

s/ R. Jess Brown
R. Jess Brown
Alvin J. Bronstein
Malcolm Farmer III
Lawyers Constitutional
Defense Committee
603 N. Farish St.
Jackson, Mississippi

Attorneys for Plaintiffs

Of Counsel:
John L. Saltonstall, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. 4025

REV. CLIFTON WHITLEY, ET AL., *Plaintiffs*,

v.

PAUL B. JOHNSON, ET AL., *Defendants*.

Answer of Defendants—Filed October 26, 1966

The Defendants, Paul B. Johnson, Governor of the State of Mississippi and Chairman of the State Board of Election Commissioners; Heber Ladner, Secretary of State of Mississippi and Secretary of the State Board of Election Commissioners; and Joe T. Patterson, Attorney General of Mississippi and a member of the Board of Election Commissioners, by their attorney, file herewith their answer to the Complaint filed against them in this action:

FIRST DEFENSE

Defendants deny that this Court has jurisdiction of the parties or the subject matter of this action.

SECOND DEFENSE

Defendants deny the allegations of Paragraph 1 and 2 of the Complaint.

Defendants deny that persons constituting the class purport to be represented by Plaintiffs are so numerous as to make it impracticable to bring them all before the Court. The named Plaintiffs constitute the entire class.

Defendants admit that Plaintiffs are Negro citizens of the United States and the State of Mississippi, and that each is a qualified elector in the State of Mississippi. They deny that Plaintiff Whitley is in every respect qualified to

be an independent candidate for the office of United States Senator from the State of Mississippi in the November 8, 1966 general election. They admit that he resides in Marshall County, Mississippi, and that on September 27, 1966, he filed a petition with the Secretary of State to have his name printed on the ballot as a candidate for United States Senator. They admit that his petition contained 3,540 signatures of which 2,055 were certified by county registrars as being qualified electors in Mississippi. They deny that his petition was a valid petition. They deny that Dock Drummond is in every respect qualified to be an independent candidate for the office of Representative to The United States Congress from the First Congressional District of Mississippi. They admit that he resides in Attala County, Mississippi; that on September 28, 1966, he filed a petition with the Secretary of State seeking to have his name placed on the ballot in the November 8, 1966 general election as an independent candidate for Congress. They admit that his Petition contained 537 signatures and that 445 names appearing thereon were certified by county registrars as being qualified electors. They deny that his petition was a valid petition in accordance with law. Defendants deny that Plaintiff Sanders is in every respect qualified to be a candidate for the office of Representative of The United States Congress from the Third Congressional District of Mississippi. They admit that she resides in Hinds County and that on September 29, 1966, she filed a petition with the office of the Secretary of State seeking to have her name placed on the ballot as a candidate for Congress. They admit that this petition contained 386 names and that 218 of these names were certified by the registrar of Hinds County as being qualified electors. They deny that her petition was a valid petition in accordance with law.

Defendants admit the allegations of Paragraph 5 of the Complaint, except that they deny that the State Board of Election Commissioners has the general over-all responsibility for the conduct of all the elections in the State of Mississippi.

Defendants admit that on or about the 10th day of October, 1966, the Defendants, acting in their official capacities, rejected the petitions filed by Plaintiffs, but deny that the sole and only grounds were that the same did not comply with the provisions of Section 3260 as amended by Chapter 613 of the Laws of 1966 of the regular session of the Mississippi Legislature. They would show unto the Court that the petitions of Plaintiffs Whitley and Drummond were also rejected because they each had been candidates in the Democratic Primary Election held on June 7, 1966, for the same offices and were defeated in that primary election.

Defendants admit the allegations of Paragraph 7 of the Complaint.

Defendants deny the allegations of Paragraph 8 of the Complaint, and allege that the Supreme Court of Mississippi, interpreting Section 3260, when read in conjunction with other sections governing elections, has declared that any person running as a candidate in a primary election and defeated in that election may not thereafter have his name placed on the ballot as an independent candidate for that same office by petition.

Defendants admit the allegations of Paragraph 9 of the Complaint.

Defendants admit that the present members of the State Board of Election Commissioners are White and that past members, since sometime prior to 1900, have been White. They deny that White political supremacy has prevailed in Mississippi during the entire history of the State of Mississippi.

Defendants are without information sufficient to form a belief as to the truth of the averment of Paragraph 11 of the Complaint, but allege that the official census of 1960 taken by the United States Government speaks for itself. They are without information sufficient to form a belief as to the truth of the averment of Paragraph 11(b) of the Complaint.

Defendants admit that during the past several years, judgments have been entered in the District Courts of The United States in Mississippi and in the Court of Appeals for the Fifth Circuit granting injunctions against certain county registrars upon findings of discrimination in accordance with a pattern or practice.

Defendants are without information sufficient to form a belief as to the truth of the averments of Paragraph 13 of the Complaint.

Defendants admit that acting pursuant to Section 3260 of the Mississippi Code as amended and for other reasons, Defendants have refused to place the names of the named Plaintiffs on the ballot for the general election of November 8, 1966, as independent candidates for the offices they seek.

Defendants deny the allegations of Paragraph 15 of the Complaint.

Defendants admit the allegations of Paragraph 16 of the Complaint, but deny that Section 3260, as amended, is such as requires the institution of any action in the United States District Court for the District of Columbia under Section 5 of the Voting Rights Act of 1965.

Defendants deny the allegation of Paragraph 17 of the Complaint.

Defendants deny the allegations of Paragraph 18 of the Complaint.

Defendants deny the allegations of Paragraph 19 of the Complaint.

Defendants admit that they will continue to give effect to Section 3260 as amended by Chapter 613 of the Laws of 1966, but deny that Plaintiffs will be irreparably injured.

Defendants deny that Plaintiffs have no plain, adequate or complete remedy at law to redress their alleged wrongs and allege that they do have a remedy in the State Courts of Mississippi.

THIRD DEFENSE

Defendants allege that the time for election of the State Senators and Representatives from Mississippi to the United States Congress is fixed by Federal statute, Title 2, Section 1 and 7 of the United States Code and that this Court is without jurisdiction, or, in the alternative, that it would be inappropriate for this Court to enjoin the holding of the general elections now scheduled for November 8, 1966, in the absence of an opportunity for The United States, acting through the Department of Justice, to appear as a Defendant in this action.

FOURTH DEFENSE

Defendants allege that this action falls in the category covered by Title 28, Section 1344, and being limited to an election for United States Senator and Representative in Congress, this Court is without jurisdiction to grant the relief sought by Plaintiffs.

PAUL B. JOHNSON, Governor of the State of Mississippi,

HEBER LADNER, Secretary of State of Mississippi,

JOE T. PATTERSON, Attorney General of the State of Mississippi

Defendants

JOE T. PATTERSON, Attorney General of the State of Mississippi,

WILL S. WELLS, Assistant Attorney General of the State of Mississippi

Attorneys for Defendants

By: WILL S. WELLS
Will S. Wells

Of Counsel for Defendants

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*,

v.

PAUL B. JOHNSON, GOVERNOR OF MISSISSIPPI, ET AL.,
Defendants.

Opinion of the District Court—Filed October 26, 1966

The plaintiffs in this case are three negro citizens of Mississippi who seek injunctive relief against the defendants as the Board of Election Commissioners of Mississippi to restrain their application and use of House Bill 68, Mississippi Laws 1966 to these plaintiffs to prevent them from appearing on the ballot as candidates for the office of United States Senator and United States House of Representatives in the general election on November 8, 1966. It is contended that this legislative enactment is violative of § 5 of the Civil Rights Act of 1965 and that the Fifteenth Amendment rights of these plaintiffs will be violated by a refusal to place their names as candidates on such ballot. The defendants declined to place the names of these proposed candidates on such ballot because two of them had run and had been defeated as Democratic candidates for such offices in the June 1966 primary election in Mississippi and that they were thus disqualified to run again as independent candidates for the same office at the succeeding general election. The defendants likewise refused to place the names of the plaintiffs on the ballot at the coming November 1966 general election because their petitions or applications to the Board of Election Commissioners did not contain the requisite number of signatures of qualified electors under House Bill 68, Mississippi Laws 1966 to entitle them to a place on said ballot.

Finding of Facts

This case was presented to the Court on the pleadings, affidavit of one witness and documentary evidence in support of this application by the plaintiffs for an interlocutory or temporary injunction. The plaintiffs' application to the Board of Election Commissioners contained the signatures of the requisite number of qualified electors to entitle each of the plaintiffs to have his and her name placed on the ballot as a candidate for the office of United States Senator and as candidates for the office of United States House of Representatives under the requirements of § 3260, prior to the passage of House Bill 68, Mississippi Laws 1966. No adjudication was sought or obtained as to whether or not said House Bill 68, Mississippi Laws 1966 denied or abridged any right to vote on account of race or color as provided by 42 U.S.C.A. § 1973c. This suit has been expeditiously processed and heard on the eve of such general election as quickly as was reasonably possible under existing circumstances and conditions. This is an extremely important suit to all parties affected and concerned and involves some very far reaching and intricate and complicated questions of law and fact which should not be resolved in haste at the risk of impinging upon important rights of all parties in this case. It appears to this Court that the granting of the relief herein awarded would not be as hurtful to the ultimate rights of the defendants as a denial of such relief would be hurtful to the ultimate rights of the plaintiffs if a contrary conclusion were ultimately reached.

Conclusions of Law

This Court has full equity jurisdiction of this suit under 42 U.S.C.A. § 1973c. The Court has the power to fashion its judgment to effectually suspend the application of House Bill 68, Mississippi Laws 1966 as to these plaintiffs in an effort to avoid undue harm and injury to either party to this suit; and to order the defendants to forthwith place

the names of the plaintiffs as candidates for said national offices on the ballot to be used by the electors at the November 8, 1966 general election in Mississippi without regard to said House Bill 68, Mississippi Laws 1966; and the defendants will be ordered and directed to activate and implement such order of this Court to the end that all qualified electors may have an opportunity to cast their vote for the plaintiffs as candidates for said offices at said election if they wish to vote for them t'. efor. The judgment of the Court incorporating this per curiam opinion by reference thereto may be presented to and signed by any one of the judges of this Court as the order of the entire Court. An order accordingly may be presented.

s/ ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/ HAROLD COX
United States District Judge

s/ DAN M. RUSSELL, JR.
United States District Judge

October 26, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*,

v.

PAUL B. JOHNSON, GOVERNOR OF MISSISSIPPI, ET AL.,
Defendants.

Order Granting Temporary Injunction—Filed October 27, 1966

Pursuant to findings and conclusions herein dated October 26, 1966, and made a part hereof by reference thereto;

IT IS ORDERED, ADJUDGED AND DECREED by the Court: That the defendants, as members of the State Board of Election

Commissioners of the State of Mississippi, are ordered and directed to place on the ballot to be used at the general election in the State of Mississippi on November 8, 1966, the name of Clifton Whitley as an independent candidate for the office of United States Senator, Dock Drummond as an independent candidate for the office of United States Representative for the First Congressional District of Mississippi and Emma Sanders as an independent candidate for the office of United States Representative for the Third Congressional District of Mississippi, upon said plaintiffs posting a bond herein in the penalty of five hundred dollars, conditioned according to law to be approved by the Clerk of this Court. No process need issue pursuant to ths order, but after said bond is posted and approved, an attested copy of this order shall be served by the United States Marshal upon the Attorney General of Mississippi as counsel for the defendants as due and sufficient notice hereof.

ORDERED, ADJUDGED AND DECREED, this October 27, A.D., 1966.

HAROLD COX
United States District Judge

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

v.

PAUL B. JOHNSON, ET AL., *Defendants*

Motion for Interlocutory Injunction—Filed October 13, 1967

Upon the pleadings and stipulation filed herein and the affidavits attached hereto, the plaintiffs move this honorable Court for an interlocutory injunction enjoining the de-

fendants, their agents, employees, representatives, successors, appointees and all persons acting in concert with them, pending the final hearing and determination of this action from:

(1) enforcing or otherwise giving any legal effect to House Bill 68 of the Mississippi Laws of 1966, purporting to amend Section 3260, Mississippi Code of 1942;

(2) failing or refusing to accept the petitions as Independent candidates, of Rev. Sammy Rash, Philip McKinney, Dan Lofton Mason, L. C. Leach, Rev. J. L. Brown, Johnnie Ross, John Daniel Wesley, George Raymond, Bennie L. Thompson, Ellis Saddler, Floyd Moore, H. L. Gray Sr., Hubert McDonald, Rev. L. C. Coleman, Mrs. Fannie Lou Hamer, and Harold T. Magee, all being members of the class of plaintiffs, and all others similarly situated, for their respective intended offices in the November 7, 1967 general election;

(3) failing or refusing to include the names of the above mentioned class plaintiffs, and all others similarly situated, as candidates who qualify on the official ballots for said general election on November 7, 1967;

(4) in the alternative, proceeding in any way with or from holding the general elections now scheduled for November 7, 1967 until the plaintiffs' request for other relief as stated above is heard and determined.

Plaintiffs further move this honorable Court:

(5) to convene for the purpose of hearing and determining this application for an interlocutory injunction, a court of three judges in accordance with the provisions of Title 28 U.S.C. § 2284, on the grounds that:

(a) unless enjoined by this honorable Court, the defendants will perform or fail to perform as the case may be, the acts referred to above, and

(b) such action by the defendants will result in irreparable injury, loss and damage to the plaintiffs as more particularly appears in the verified complaint, stipulation and affidavits attached hereto.

Respectfully submitted,

ALVIN J. BRONSTEIN
Alvin J. Bronstein
603 N. Farish St.
Jackson, Mississippi
Attorney for Plaintiffs

[Certificate of service omitted in printing]

State of Mississippi
County of Bolivar

AFFIDAVIT

Rev. Sammy Rash being duly sworn deposes and says:

1. That I am a Negro citizen of Bolivar County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of State Representative in District 16, Post 2, Bolivar County in the November 1967 general election by filing a petition with the Bolivar County Election Commission;

3. I was thereafter advised by the Bolivar County Election Commission that I had been disqualified or challenged because I failed to list the Post number on my petition although same appeared on the subversive affidavit that I was required to file, and that my name would not be placed on the ballot in the November 7, 1967 general election;

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the

Mississippi Code of 1942 prior to its amendment in 1966 or that I would have had sufficient time under the old law to correct my petition if it was necessary.

REV. SAMMIE RASH

Sworn to and subscribed before me
this 9 day of October, 1967.

THOMAS H. MOORE
Notary Public

My commission expires: August 8, 1970

State of Mississippi
County of Madison

AFFIDAVIT

George Raymond, Jr., being duly sworn deposes and says:

1. That I am a Negro citizen of Madison County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of State Representative, District 29, Madison County, Post 1 in the November 1967 general election by filing a petition with the Madison County Election Commission;

3. That I was thereafter advised by the Madison County Election Commission that I had been disqualified or challenged because my petition contained insufficient signatures, some of the signatures did not list the precincts and all of the signatures were not signed personally by the electors, and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260

of the Mississippi Code of 1942, prior to its amendment in 1966.

GEORGE RAYMOND, JR.

Sworn to and subscribed before me
this 9th day of October, 1967.

H. A. JONES
Notary Public

My commission expires: March 11, 1968

State of Mississippi
County of Pike

AFFIDAVIT

Harold T. Magee, being duly sworn, deposes and says:

1. That I am a Negro citizen of Pike County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Constable, Beat 1, Pike County, in the November 1967 general election by filing a petition with the Pike County Election Commission;

3. I was thereafter advised by the Pike County Election Commission that I had been disqualified or challenged because I had voted in the August 1967 Democratic Primary and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

HAROLD T. MAGEE

Sworn to and subscribed before me
this 7 day of October, 1967.

JOHN M. MCCRAY, SR.
Notary Public

My commission expires: June 23rd 1969

State of Mississippi
County of Hinds

AFFIDAVIT

L. C. Leach, being duly sworn, deposes and says:

1. That I am a Negro citizen of Hinds County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Justice of the Peace, Beat 2, Post 1, Hinds County, in the November 1967 general election by filing a petition with the Hinds County Election Commission;

3. I was thereafter advised by the Hinds County Election Commission that I had been disqualified or challenged because I had voted in the August 1967 Democratic Primary and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

L. C. Leach

Sworn to and subscribed before me
this 9 day of October 1967.

Sarah Harvey Stevens
Notary Public

My Commission Expires May 9, 1970.

State of Mississippi
County of Quitman

AFFIDAVIT

Rev. L. C. Coleman being duly sworn deposes and says:

1. That I am a Negro citizen of Quitman County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Supervisor, Beat 3, Quitman County, in the November 1967 general election by delivering my petition to the Circuit Clerk of Quitman County to have him certify the signatures.

3. That I was thereafter advised by the Circuit Clerk of Quitman County that I did not have to file a petition with anyone in order to run as an Independent candidate and I therefore did not file my petition with the Quitman County Election Commission prior to the cutoff date and I am advised that my name will not be placed on the ballot in the November 7, 1967 general election;

4. I am informed and believe that I would have had sufficient time to file my petition in accordance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966, after I learned that the information given me by the Circuit Clerk was incorrect.

REV. L. C. COLEMAN

Sworn to and subscribed before me
this 9 day of October, 1967.

MARIE W. EAVENSON, *Circuit Clerk*
Notary Public

My commission expires: January 1, 1967

State of Mississippi
County of Hinds

AFFIDAVIT

Hubert McDonald, being duly sworn deposes and says:

1. That I am a Negro citizen of Madison County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Constable, Beat 3, Post 2, Madison County, in the November 1967 general election by filing a petition with the Madison County Election Commission;

3. That I was thereafter advised by the Madison County Election Commission that I had been disqualified or challenged because my petition contained insufficient signatures, some of the signatures did not list the precincts and all of the signatures were not signed personally by the electors, and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

HUBERT McDONALD

Sworn to and subscribed before me
this 7th day of October, 1967.

SARAH HARVEY STEVENS
Notary Public

My commission expires: May 9, 1970

State of Mississippi
County of Hinds

AFFIDAVIT

Dan Lofton Mason, being duly sworn, deposes and says:

1. That I am a Negro citizen of Hinds County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Supervisor, Beat 2, Hinds County, in the November 1967 general election by filing a petition with the Hinds County Election Commission;

3. I was thereafter advised by the Hinds County Election Commission that I had been disqualified or challenged because I had voted in the August 1967 Democratic Primary and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

DAN LOFTON MASON

Sworn to and subscribed before me
this 7th day of October, 1967.

SARAH HARVEY STEVENS
Notary Public

My commission expires: May 9, 1970

State of Mississippi
County of Hinds

AFFIDAVIT

Bennie L. Thompson, being duly sworn deposes and says:

1. That I am a Negro citizen of Madison County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Supervisor, Beat 3, Madison County, in the November 1967 general election by filing a petition with the Madison County Election Commission;

3. That I was thereafter advised by the Madison County Election Commission that I had been disqualified or challenged because my petition contained insufficient signatures, some of the signatures did not list the precincts and all of the signatures were not signed personally by the electors, and that my name would not be placed on the ballot in the November 7, 1967 general election.

2. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

BENNIE L. THOMPSON

Sworn to and subscribed before me
this 7th day of October, 1967.

SARAH HARVEY STEVENS
Notary Public

My commission expires: May 9, 1970

State of Mississippi
County of Hinds

AFFIDAVIT

Floyd Moore, being duly sworn deposes and says:

1. That I am a Negro citizen of Madison County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Justice of the Peace, Beat 3, Post 2, Madison County, in the November 1967 general election by filing a petition with the Madison County Election Commission;

3. That I was thereafter advised by the Madison County Election Commission that I had been disqualified or challenged because my petition contained insufficient signatures, some of the signatures did not list the precincts and all of the signatures were not signed personally by the electors, and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

FLOYD MOORE

Sworn to and subscribed before me
this 13th day of October, 1967.

SARAH HARVEY STEVENS
Notary Public

My commission expires: May 9, 1970

State of Mississippi
County of Hinds

AFFIDAVIT

Johnnie Ross, being duly sworn, deposes and says:

1. That I am a Negro citizen of Hinds County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Justice of the Peace, Beat 3, Hinds County, in the November 1967 general election by filing a petition with the Hinds County Election Commission;

3. I was thereafter advised by the Hinds County Election Commission that I had been disqualified or challenged because I had voted in the August 1967 Democratic Primary and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

JOHNNY ROSS

Sworn to and subscribed before me
this 13th day of October, 1967.

SARAH HARVEY STEVENS
Notary Public

My commission expires: May 9, 1970

State of Mississippi
County of Hinds

AFFIDAVIT

Rev. J. L. Brown, being duly sworn, deposes and says:

1. That I am a Negro citizen of Hinds County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Supervisor, Beat 3, Hinds County, in the November 1967 general election by filing a petition with the Hinds County Election Commission;

3. I was thereafter advised by the Hinds County Election Commission that I had been disqualified or challenged because I had voted in the August 1967 Democratic Primary and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

REV. J. L. BROWN

Sworn to and subscribed before me
this 13 day of October, 1967.

SARAH HARVEY STEVENS
Notary Public

My commission expires: May 9, 1970

State of Mississippi
County of Hinds

AFFIDAVIT

H. L. Gray, Sr., being duly sworn deposes and says:

1. That I am a Negro citizen of Madison County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Constable, Beat 3, Post 1, Madison County, in the November 1967 general election by filing a petition with the Madison County Election Commission;

3. That I was thereafter advised by the Madison County Election Commission that I had been disqualified or challenged because my petition contained insufficient signatures, some of the signatures did not list the precincts and all of the signatures were not signed personally by the electors, and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

H. L. Gray, Sr.

Sworn to and subscribed before me
this 13 day of October, 1967.

Sarah Harvey Stevens
Notary Public

My commission expires: May 9, 1970

State of Mississippi
County of Hinds

AFFIDAVIT

Ellis Saddler, being duly sworn deposes and says:

1. That I am a Negro citizen of Madison County, Mississippi;

2. That I attempted to qualify as an Independent candidate for the office of Justice of the Peace, Beat 3, Post 1, Madison County in the November 1967 general election by filing a petition with the Madison County Election Commission;

3. That I was thereafter advised by the Madison County Election Commission that I had been disqualified or challenged because my petition contained insufficient signatures, some of the signatures did not list the precincts and all of the signatures were not signed personally by the electors, and that my name would not be placed on the ballot in the November 7, 1967 general election.

4. I am informed and believe that my petition would have been proper and in compliance with Section 3260 of the Mississippi Code of 1942, prior to its amendment in 1966.

ELLIS SADDLER.

Sworn to and subscribed before me
this 13 day of October, 1967.

SARAH HARVEY STEVENS
Notary Public

My commission expires: May 9, 1970

State of Mississippi
County of Hinds

AFFIDAVIT

Alvin J. Bronstein being duly sworn deposes and says:

1. That I am a member of the bar of this Court and the attorney of record for the plaintiffs in this action.

2. That I recite all the foregoing facts upon information and belief:

a. That John Daniel Wesley is a Negro citizen of Holmes County, Mississippi; that he attempted to qualify as an Independent candidate for the office of Justice of the Peace, Beat 5, Holmes County in the November 1967 general election by filing a petition with the Holmes County Election Commission; that he has been advised that he may be disqualified because he voted in the August 1967 Democratic Primary and that his name may not be placed on the ballot in the November 7, 1967 general election;

b. That Mrs. Fannie Lou Hamer is a Negro citizen of Sunflower County, Mississippi; that she attempted to qualify as an Independent candidate for the office of State Senator, District 17, Sunflower County, in the November 1967 general election by filing a petition with the Sunflower County Election Commission; that she has been advised that she has been disqualified by said election commission because she voted in the August 1967 Democratic Primary and that her name will not be placed on the ballot in the November 7, 1967 general election.

c. That Philip McKinney is a Negro citizen of DeSoto County, Mississippi; that he attempted to qualify as an Independent candidate for the office of Supervisor, Beat 4, DeSoto County in the November 1967 general election by filing a petition with the DeSoto County Election Commission; that he was advised that his petition was filed too late and that his name would not be listed on the ballot in the November 7, 1967 general election.

3. That I am informed and believe that each of the above petitions would have been proper and in compliance with Section 3260, Mississippi Code of 1942, prior to its amendment in 1966.

ALVIN J. BRONSTEIN

Sworn to and subscribed before me
this 13th day of October, 1967.

SARAH HARVEY STEVENS
Notary Public

My commission expires: May 9, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

versus

PAUL B. JOHNSON, Governor of the State of Mississippi, ET AL., *Defendants*

Opinion of the District Court—Filed October 27, 1967

Before AINSWORTH, Circuit Judge, and COX and RUSSELL, District Judges.

BY THE COURT:

The parties to this suit have stipulated: "That the only issue before the Court at this time is whether or not House Bill 68, Mississippi Laws 1966, which amended Secton 3260 of the Mississippi Code of 1942, is an attempt by the State of Mississippi *to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in*

force or effect on November 1, 1964; (language of 42 U.S.C. 1973c)." (See Stipulation, dated September 25, 1967, attached as Appendix A.)

This complaint was filed on October 20, 1966 by three named plaintiffs, Reverend Clifton Whitley, Dock Drummond and Emma Sanders, on behalf of themselves and all other persons similarly situated, as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. In the complaint plaintiffs prayed that this Court adjudge and declare House Bill 68, Mississsippi Laws 1966 (sometimes referred to as Chapter 613 of the Mississippi Laws of 1966), which amended Section 3260 of the Mississippi Code of 1942, to be in violation of Section 5 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments of the United States Constitution; that a preliminary and permanent injunction issue enjoining defendants from enforcing Chapter 613, from failing to accept the petitions of the named plaintiffs as independent candidates in the November 8, 1966 Mississippi general election, and from failing or refusing to include the names of plaintiffs, and all others similarly situated, as candidates who qualify on the official ballots for the November 8, 1966 general election.

A three-judge District Court was requested and thereafter convened for a hearing at Biloxi, Mississippi, on October 26, 1966. The Court, under its full equity jurisdiction, suspended the application of House Bill 68, Mississippi Laws 1966, and ordered that the names of the plaintiffs who were candidates for national office be placed on the ballot to be used by the electors at the general election in Mississippi on November 8, 1966. The Court did not pass on the question whether House Bill 68 denies or abridges any right to vote on account of race or color as provided by 42 U.S.C. § 1973c.

Subsequently, counsel for complainants requested that we set this case for hearing on the merits, and a Stipulation was entered into September 25, 1967 between counsel for

complainants and defendants which has been filed herewith in the record and is submitted to eliminate the need for further hearings in this case.[1] Plaintiffs submitted their brief on October 6, 1967 and defendants' reply brief was received on October 18, 1967. Plaintiffs seek a prompt decision on behalf of the class of plaintiffs who have attempted to qualify and run as independent candidates in the impending Mississippi general election on November 7, 1967. The matter, therefore, is before us on the merits for final decision.

House Bill 68, Mississippi Laws 1966, amended the existing Mississippi law by making four changes from the original statute as follows: (1) No person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election; (2) the numbers of signatures of qualified electors needed on the petition of an independent candidate have been increased; (3) each qualified elector must personally sign the petition for an independent candidate and include his polling precinct and county; and (4) the time for filing as an independent candidate is substantially earlier. All such amendatory sections apply equally to white and Negro candidates.[2]

According to the Stipulation, it is clear that the State of Mississippi is a State with respect to which the prohibitions set forth in 42 U.S.C. § 1973b(a) (Voting Rights Act of 1965) are in effect and is, therefore, subject to the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) and that said State was affected by the aforesaid provisions on June 11, 1966 (when House Bill 68, Mississippi

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[1] See letter dated September 25, 1967 to counsel for plaintiffs to the members of this Court reproduced as Appendix B.

[2] In 1927, the Supreme Court of Mississippi interpreted this statute which was then Section 3717, Mississippi Code of 1906, in *Buhr* v. *Cowan*, 112 So. 386. After amendments, the statute became Section 3260, Mississippi Code of 1942. Following a ruling of the Court in *Bowen* v. *Williams*, 117 So. 2d 710, the 1966 amendment followed.

Laws 1966, was enacted) and continuously to this date. It is also true that the State of Mississippi in enacting House Bill 68, Mississippi Laws 1966, did not comply with the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) in that it did not submit said statute either to the United States District Court for the District of Columbia for a declaratory judgment, that such enactment does not have the purpose and will not deny or abridge the right to vote on account of race or color, or to the Attorney General of the United States for his approval or objection. The Court notes that 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) is concerned with enactments by a state with respect to which the prohibitions set forth in § 1973b(a) are in effect, and in order to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or in effect on November 1, 1964, such state must institute the declaratory action in the United States District Court for the District of Columbia or submit the matter for approval or rejection to the Attorney General of the United States.

The Mississippi statute under consideration (House Bill 68) is directed solely to the qualifications of candidates, whereas Section 5 has reference to the qualifications of voters. We do not believe that the Mississippi statute is of the kind which Section 5 of the Voting Rights Act of 1965 was designed to prevent. The Mississippi statute under attack does not appear on its face to be one designed or intended to effect a discrimination or qualification relating to the person or voting rights of the individual. The Act does not deal with voting but deals with elections, and more particularly the candidates; therefore, it does not impinge upon Section 5 of the Voting Rights Act of 1965.

The State of Mississippi, prior to this Act, suspended its enforcement of statutory voter qualifications, including tests of literacy, and the Court takes judicial notice of the fact that over 160,000 Negroes have qualified to vote since

1963. Cases cited in plaintiffs' brief have been noted, and none show the application of Section 5 of the Voting Rights Act of 1965 to the kind of statute here involved. The legislative history of the Act is indicated in both plaintiffs' and defendants' briefs, citing portions of a hearing before the Judiciary Committee of the Senate. These exchanges between Attorney General Katzenbach and the senators are confined to questions involving qualifications of voters. On the 1966 motion in this case, the Court took jurisdiction under 42 U.S.C.A. § 1983 and § 1973c but made no application of § 1973c to the ruling therein. It declines to do so here.

The Court judicially knows (from all but seven counties in Mississippi in which the information was not available) that sixty-seven Negroes did qualify as candidates in the Democratic primary elections of 1967 and seventeen were nominated for the general election.

The motion for an interlocutory injunction is accordingly denied, and the complaint in its entirety is without merit and is dismissed.

The judgment incorporating this per curiam opinion by reference thereto may be presented and signed by the managing judge of this Court as the order of the entire Court.

ROBERT A. AINSWORTH, JR.
United States Circuit Judge

WILLIAM HAROLD COX
United States District Judge

DAN M. RUSSELL, JR.
United States District Judge

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

v.

PAUL B. JOHNSON, Governor of the State of Mississippi, ET AL., *Defendants*

Stipulation—Filed September 25, 1967

It is hereby stipulated and agreed by and between the attorneys for all of the parties as follows:

1. That the state of Mississippi is a State with respect to which the prohibitions set forth in 42 U.S.C. § 1973b(a) (Voting Rights Act of 1965) are in effect and is therefore subject to the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965). The State of Mississippi was affected by the aforesaid prohibitions and subject to the aforesaid provisions on June 11, 1966 and continuously to this date;

2. That the State of Mississippi, in enacting House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, did not comply with the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) in that the State of Mississippi did not submit said statute *either* to the United States District Court for the District of Columbia for a declaratory judgment *or* to the Attorney General of the United States for his approval or objection. This is not to be construed as a concession by the defendants that the State of Mississippi was under any lawful obligation to so comply with the provisions of 42 U.S.C. § 1973c;

3. That one or more Negro independent candidates for political office in the Mississippi general election scheduled for November 7, 1967 has or have been challenged and disqualified from having his or their names placed on the ballot in said election by virtue of having certain provisions of House Bill 68, Mississippi Laws 1966, which amended Section 3260, Mississippi Code of 1942, applied to him or them. In particular, the following provisions of said statute have been applied to one or more of said Negro independent candidates who attempted to so qualify:

> "No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election . . .".

4. That some of the aforesaid Negro independent candidates who have been so challenged or disqualified are members of the class of plaintiffs described in the complaint herein;

5. That the only issue before the Court at this time is whether or not House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, is an attempt by the State of Mississippi *to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964;* (language of 42 U.S.C. 1973c).

6. That this stipulation shall be filed with the Court.

Dated: September 25, 1967

ALVIN J. BRONSTEIN
Attorney for Plaintiffs

Dated: September 25, 1967

WILL S. WELLS
Attorney for Defendants

APPENDIX B

LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE
OF THE AMERICAN CIVIL LIBERTIES UNION
SOUTHERN OFFICE
603 NORTH FARISH STREET, JACKSON, MISSISSIPPI 39202
(601) 948-4191
ALVIN J. BRONSTEIN, CHIEF STAFF COUNSEL

September 25, 1967

Hon. Robert A. Ainsworth, Jr.
United States Court of Appeals
400 Royal Street
New Orleans, Louisiana

Hon. W. Harold Cox
P. O. Box 2447
Jackson, Mississippi

Hon. Dan M. Russell, Jr.
P. O. Box 1930
Gulfport, Mississippi

Re: Whitley v. Johnson
Civil Action No. 4025(J)

To the Judges of this Honorable Court:

Mr. Wells, on behalf of the defendants, and myself have finally entered into a stipulation in the above cause. We have today filed the original and three copies of same with the Clerk in Jackson, but I am enclosing additional copies herewith so that the Court may see that we have stipulated both as to all of the facts as well as to the sole issue we believe to be before the Court at this time.

Since all of the parties would hope to obtain a ruling from the Court prior to the November 7, 1967 general election in Mississippi, Mr. Wells and I have agreed that I will submit a brief on behalf of the plaintiffs within ten days from today and Mr. Wells will submit his brief

on behalf of the defendants within ten days after he receives plaintiffs' brief, all, of course, subject to any different or further direction from the Court.

Both Mr. Wells and myself would welcome the opportunity, if possible, to attend before the Court for the purpose of answering any questions the Court might have, as well as to amplify our written argument.

Respectfully,

ALVIN J. BRONSTEIN
Alvin J. Bronstein

cc: Will S. Wells, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

v.

PAUL B. JOHNSON, Governor of the State of Mississippi, ET AL., *Defendants*

Final Judgment—Filed October 31, 1967

This action having been heard on the merits pursuant to a stipulation entered into by counsel for the parties, and the plaintiffs' motion for an interlocutory injunction having been submitted together with the case on the merits, and the curiam opinion filed in this Court on October 27, 1967, which opinion is incorporated in its entirety herein by reference;

IT IS, ORDERED, ADJUDGED AND DECREED by the Court:

That the plaintiffs' motion for an interlocutory injunction is denied, and the complaint herein in its entirety, be and is hereby, dismissed.

ORDERED, ADJUDGED AND DECREED, this 30th day of October, A.D., 1967.

DAN M. RUSSELL, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

v.

PAUL B. JOHNSON, Governor of the State of Mississippi, ET AL., *Defendants*

Notice of Appeal to the Supreme Court of the United States—Filed October 31, 1967

1. Notice is hereby given that Rev. Clifton Whitley, Dock Drummond and Emma Sanders, on behalf of themselves and all others similarly situated, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment denying plaintiffs' motion for an interlocutory injunction and dismissing the complaint entered in this action on October 30, 1967.

2. This appeal is taken pursuant to 28 U.S.C. § 1253.

3. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript, the following:

Complaint

Answer of Defendants

Affidavit of Lawrence Guyot filed as exhibit P-1 on October 26, 1966.

Certified copy of population census of Mississippi, 1950 and 1960, filed as exhibit P-2 on October 26, 1966.

Copy of House Bill #68 filed as exhibit D-2 on October 26, 1966.

Opinion of this three-judge Court dated October 26, 1966 and filed October 26, 1966.

Order granting temporary injunction dated and filed October 27, 1966.

Stipulation dated September 25, 1967 and filed September 25, 1967.

Motion for Interlocutory Injunction and affidavits attached thereto filed on October 13, 1967.

Opinion of this three-judge Court filed October 27, 1967.

Final Judgment dated October 30, 1967 and filed October 31, 1967.

Notice of Appeal and Certificate of Service.

The following questions are presented by this appeal:

a. Did the District Court err:

(i) In finding that House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, does not come within the purview of and is not covered by Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) so as to require compliance with said Section 5 by the State of Mississippi prior to enforcing or applying said Section 3260 as amended?

(ii) In not finding that the provision of House Bill 68, Mississippi Laws 1966, amending Section 3260 of the Mississippi Code of 1942, which requires that "each elector shall personally sign" the petition of an independent candidate, violates the Voting Rights Act of 1965 in that it

imposes a requirement for literacy and the ability to read and write which requirements are prohibited by 42 U.S.C. § 1973b (a) and (c)?

(iii) In not finding that the provision of House Bill 68, Mississippi Laws 1966, amending Section 3260 of the Mississippi Code of 1942, which prohibits independent candidates from voting in a primary election violates the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States?

(iv) In not finding that the provision of House Bill 68, Mississippi Laws 1966, amending Section 3260 of the Mississippi Code of 1942, which prohibits independent candidates, but not Republican candidates, from voting in the Democratic Primary, violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

(v) In denying plaintiffs' motion for an interlocutory injunction and dismissing plaintiffs' complaint?

b. Whether, if the Supreme Court of the United States answers any of the foregoing questions in the affirmative after the November 7, 1967 general election, said Court should order a new election for each of the affected offices pursuant to Section 3260 prior to its amendment in 1966.

Respectfully submitted,

ALVIN J. BRONSTEIN
Alvin J. Bronstein
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603 N. Farish Street
Jackson, Mississippi

RICHARD B. SOBOL
606 Common Street
New Orleans, Louisiana

Attorneys for Appellants

[Certificate of Service omitted in printing].

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

Nos. 1058, 1059 and 1174

J. C. FAIRLEY, ET AL., *Appellants*,

v.

JOE T. PATTERSON, ET AL.;

CHARLES E. BUNTON, ET AL., *Appellants*,

v.

JOE T. PATTERSON, ET AL.; and

CLIFTON WHITLEY, ET AL., *Appellants*,

v.

JOHN BELL WILLIAMS, Governor of Mississippi, ET AL.

APPEALS from the United States District Court for the Southern District of Mississippi.

Order Postponing Jurisdiction—June 10, 1968

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. The cases are consolidated and a total of two hours is allotted for oral argument.

SUPREME COURT, U. S.

SEP 28 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 3

RICHARD ALLEN, *et al.*,

Appellants,

v.

STATE BOARD OF ELECTIONS, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

JACK GREENBERG
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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

RICHARD ALLEN, *et al.*,

Appellants,

v.

STATE BOARD OF ELECTIONS, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the United States District Court for the Eastern District of Virginia entered on May 2, 1967, denying their prayers for injunctive relief and a declaratory judgment and dismissing the case, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the District Court for the Eastern District of Virginia is reported at 268 F. Supp. 218. Copies of the Opinion and Judgment of the District Court are attached hereto, Appendix pp. 1a to 9a.

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of the District Court was invoked under 28 U.S.C. §§1331, 1343, 2201 to enforce rights protected by the equal protection clause of the Fourteenth Amendent and the Voting Rights Act of 1965 (42 U.S.C. §§1973, *et seq.*). The complaint sought to restrain the Virginia State Board of Elections and other election officials from enforcing a state statute, Va. Code §24-252, insofar as it authorized the officials not to count write-in votes unless they were inserted on the ballot in the voters' own handwriting. A statutory three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284 (R. 20).

A final judgment of the court below denying injunctive relief and dismissing the case was entered May 2, 1967 (R. 90). Timely notice of appeal to this Court was filed in the court below on June 29, 1967 (28 U.S.C. §2101(b)) (R. 91). The District Court, by order dated August 24, 1967, extended the time for docketing the appeal in this Court to September 28, 1967 (R. 96).

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253. This Court's jurisdiction is sustained by *Harman* v. *Forssenius*, 380 U.S. 528, 532-533; see also, *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Query* v. *United States*, 316 U.S. 486; *Stratton* v. *St. Louis-Southwestern Ry. Co.*, 282 U.S. 10.

Constitutional and Statutory Provisions Involved

1. This case involves the validity of Code of Virginia, 1950, §24-252 (Code of Va. 1964 Repl. Vol. 5, p. 271), which provides as follows:

> §24-252. *Insertion of names on ballots.*—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of §24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person. (Code 1919, §162; 1936, p. 278; 1952, c. 581; 1962, c. 536.)

2. The following additional provisions are material to an understanding of the issues presented.

(a) Code of Virginia, §24-251:

> §24-251. *Judges or others to assist certain voters.*—Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may, if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so

designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months. (Code 1919, §166; 1946, p. 316; 1950, p. 230.)

(b) Constitution of Virginia, §§27, 28:

"§27. *Method of Voting.*—All elections by the people shall be by ballot; * * *

"The ballot box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed or counted, in secret.

So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained."

"§28. *Ballots.*—The General Assembly shall provide for ballots without any distinguishing mark or symbol, for the use in all State, county, city and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candidates and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another."

(c) Constitution of the United States, Art. I, Section 4, Clause 1:

SECTION 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Repre-

sentatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

(d) Title 2, U.S.C., §9:

§9. *Voting for Representatives.*—All votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect. (R. S. §27; Feb. 14, 1899, c. 154, 30 Stat. 836.)

(e) Title 42, U.S.C., §1973b(a), (b), (c):

§1973b. Suspension of the use of tests or devices in determining eligibility to vote—Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under snbsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the

five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Definition of test or device

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(f) Title 42, U.S.C., §1973c:

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in sec-

tion 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub.L. 89-110, §5, Aug. 6, 1965, 79 Stat. 439.

(g) Title 42, U.S.C., 1973*l*(c)(1):

Definitions

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this sub-chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(h) Title 42, U.S.C., §1973i(a):

§1973i. Prohibited acts—Failure or refusal to permit casting or tabulation of vote

(a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

Questions Presented

I.

Whether the requirement of Virginia Code section 24-252, that write-in votes be in the voters' own handwriting, is in conflict with the provisions of the Voting Rights Act of 1965 forbidding denial of the right to vote for failure to comply with "tests or devices" as defined in the Act?

II.

Whether Virginia Code section 24-252 unconstitutionally discriminates against illiterates by failing to provide equal protection for the secrecy of their ballots in violation of the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

This litigation involves the claim of certain illiterate registered voters, newly eligible to vote because of the provisions of the Voting Rights Act of 1965, that Virginia election law unlawfully discriminated against them. They object to the lack of any procedures for protecting the privacy and secrecy of illiterates' write-in votes from disclosure to state officials. The issues arose in the context of a general election for members of the House of Representatives which was held November 8, 1966, in Virginia's Fourth Congressional District. Rep. Watkins M. Abbitt, the incumbent, and Edward J. Silverman were the candidates listed on the ballot. The plaintiff-appellants were supporters of S. W. Tucker, a well-known civil rights attorney in Virginia who was a write-in candidate for Congress. The plaintiffs, as the court below found, were "unable to spell accurately or to write legibly" (268 F. Supp. at 219). They sought to vote for S. W. Tucker by pasting a sticker, upon which his name was printed, on the official ballot under the names of the listed candidates, and then making the appropriate marking preceding his name (R. 9-17). The defendant election officials did not count the votes for Tucker on ballots marked with the Tucker stickers. They disallowed the ballots, relying on Virginia Code section 24-252, which permits the insertion of names on general election ballots in the voter's "own

handwriting," and provides that ballots with a name placed thereon "in violation" of the section shall not be counted for such person. According to the statement published by the defendant Board of Elections, the 1966 congressional election was won by Rep. Abbitt with 45,226 votes; Mr. Silverman drew 14,827 votes, and 7,907 write-in votes were counted (R. 61, Pl's Exhibit No. 2, p. 9).

This action was commenced November 28, 1966, shortly after the election. Plaintiffs prayed in their complaint, *inter alia,* for a judgment declaring Virginia Code section 24-252 invalid and in conflict with the equal protection clause of the Fourteenth Amendment and also the Voting Rights Act of 1965, insofar as the Virginia law "purports to deny any voter, solely because of his inability to write, the privilege of casting a secret ballot for a person whose name is not printed on the official ballots and having such ballot counted in the appropriate returns; . . ." (R. 7); and prayed that the court enjoin defendants from failing and refusing to count votes inserted on official ballots "by means other than handwriting" in the November 1966 election, and such votes "hereafter given" in future elections (R. 8). By their subsequent motion for summary judgment, appellants indicated that they mainly sought relief for future elections and not for the 1966 election (R. 69).

A statutory three-judge district court was convened to hear and determine the case (R. 20-21). The plaintiffs submitted requests for admissions under Rule 36 (R. 38-47), none of which were denied under oath by the defendants (R. 49-56). The defendant State Board of Elections had the statutory duty to supervise and coordinate the work of county and city electoral boards to obtain uniformity in their practices and proceedings and to make rules and regulations for their functioning. (Code of

Virginia, 1950, §24-25.) The other defendants were judges of election and clerks of election in precincts in which the plaintiffs resided. The requests for admissions developed the facts with respect to the use of Tucker stickers by illiterate voters in several areas where paper ballots were used, and that such votes were not counted. The court below treated the facts as undisputed (268 F. Supp. at 219).

By way of defense, the State Board of Elections offered in evidence several letters or bulletins which it had distributed to local voting officials during the summer of 1965 after the passage of the Voting Rights Act. One letter to all voting registrars advised that Virginia's prior registration procedures could no longer be used, and that if applicants were unable to complete registration forms the registrar should orally examine the applicant and assist him in completing the registration forms (R. 65). The Voting Rights Act provisions which prompted the above-mentioned letter were those which temporarily forbade the use of literacy tests or devices in states to which the Act was made applicable. (42 U.S.C. §1973b.) And, of course, the Voting Rights Act, designed to end racial discrimination in voting, was applicable in Virginia.[1]

---

[1] The designation of Virginia under §1973b(b) was published in the Federal Register on August 7, 1965, 30 Fed. Reg. 9897. In describing the history which led to passage of the Act this Court said in *South Carolina v. Katzenbach*, 383 U.S. 301, 310-311:

> Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. (Footnotes omitted.)

The State Board of Elections also introduced a bulletin to election judges dated October 15, 1965 (R. 68). The bulletin was supplied to voting registrars and secretaries of electoral boards for them to distribute to judges of elections (R. 66-67). The bulletin stated:

BULLETIN FROM STATE BOARD OF ELECTIONS

TO ALL JUDGES OF ELECTION:

On August 6, 1965, the "Voting Rights Act of 1965" enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

These instructions also apply to precincts in which voting machines are used.

There was no evidence in the record indicating to what extent, if any, the public was advised of the rule and policy set forth in the bulletin to election judges. Neither is there anything in the record indicating whether or not any instructions similar to those stated in the 1965 bulletin were reissued at the time of the 1966 congressional election or whether voters had any way of knowing that election

judges were instructed to assist illiterates in completing their ballots. The court below merely found that "The Attorney General of Virginia asserted, and the plaintiffs do not controvert, that these instructions apply while the Voting Rights Act of 1965 is effective in the state." (268 F. Supp. at 221.)

The district court denied the relief prayed and dismissed the case. The court rejected appellants' claim of unconstitutional discrimination against illiterates, citing the decision in *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, for the proposition that discrimination between illiterate and literate voters does not violate the Fourteenth Amendment. (268 F. Supp. at 220.) The court also rejected appellants' argument that Virginia Code section 24-252 was rendered invalid by the Voting Rights Act of 1965. The court held that the Virginia requirement that the write-in candidate's name be inserted in the voter's own handwriting was "not a test or device defined in 42 U.S.C. §1973b(c)." (268 F. Supp. at 221.) The court said that the requirement did not prevent the appellants from registering and voting, and that the Board of Elections' bulletin provided for them to be assisted by election judges in casting ballots.

The Questions Are Substantial

Introduction

At stake in this case are the claims of educationally deprived voters, who cannot spell accurately or write legibly, that they have the same right to vote for the candidates of their choice, to have their votes counted, and to protect the secrecy of their ballots from state election judges as do other voters.

The questions presented are of public importance from several points of view. First, of course, the right to vote and have one's vote counted is at stake. The Court has long recognized the constitutional protection for such rights. (*Ex parte Yarbrough,* 110 U.S. 651; *United States* v. *Mosely,* 238 U.S. 383), and has on innumerable occasions stated the importance of protecting the right to vote. See, e.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370, calling the right to vote important "because preservative of all rights." And see *Reynolds* v. *Sims,* 377 U.S. 533, 555; *Harman* v. *Forssenius,* 380 U.S. 528.

Second, the case involves the rights of numerous persons newly enfranchised by the Voting Rights Act of 1965, who had long been disenfranchised by a host of discriminatory measures in Virginia and other states,[2] and presents serious questions regarding the interpretation and application of that important federal law. It is appropriate that this Court give guidance by construing the law.

Third, the case involves the secrecy of the ballot. The Court has not, to our knowledge, had a previous occasion to deal with threats to the secrecy of the ballot, but it has,

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[2] See, e.g., *Harman* v. *Forssenius,* 380 U.S. 528; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 310-311 (quoted *supra,* note 1).

of course, dealt with the kindred question of the right to anonymity in political expression, *Talley* v. *California,* 362 U.S. 60; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, and has agreed to hear a case this term involving attempted suppression of anonymous election literature. *Zwickler* v. *Koota,* No. 29, Oct. Term 1967. The right of a secret ballot is of considerable practical moment for political dissidents, such as appellants, who were supporters of a write-in candidate opposing an incumbent who had served ten consecutive terms.[3] In such circumstances the right to keep one's vote secret from a state election judge belonging to the dominant political group is of more than abstract importance. Virginia election judges are appointed by local electoral boards under a statute which directs that representation be given to the two leading political parties in the last election, Va. Code §24-30.

This controversy arises from the fact that Virginia, having been required to permit illiterates to vote by the Voting Rights Act of 1965 because the state permitted only white illiterates to vote in the past, failed to provide a method to protect the secrecy of illiterates' votes from state officials, and disallowed the votes of appellant who sought to vote secretly for a write-in candidate by inserting paper stickers bearing the candidate's name, on their ballots. By way of introduction to the issue presented, we point out several undisputed matters. First, it is agreed that in accordance with the Voting Rights Act of 1965 appellants are entitled to vote in their respective counties, notwithstanding their illiteracy. Until 1965 Virginia excluded illiterates from voting; the state Constitution and statutes required that applicants for voting registration, except those physically

[3] The Hon. Watkins Abbitt, Representative from Virginia's Fourth Congressional District has served in office since the 80th Congress.

unable, must apply in their "own handwriting."[4] But those provisions were suspended by the federal Voting Rights Act of 1965 which became applicable in Virginia August 7, 1965. 42 U.S.C. §1973b(a); 30 Fed. Reg. 9897. Second, the facts are not in dispute, and it was found by the court below that appellants were unable to write, that they did insert votes for a write-in candidate, S. W. Tucker, by using gummed stickers or labels bearing his name, and that their votes were not tabulated or counted for Tucker. Third, the background of Virginia law relevant to the case includes (1) a state constitutional provision that elections "shall be by ballot" and that "the absolute secrecy of the ballot shall be maintained" (Const. of Va., §27); and (2) a state constitutional provision permitting write-in votes (Const. of Va., §28).

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[4] Constitution of Virginia, section 20, provides in part, as follows:

> § 20. *Who may register.*—Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:
>
> • • • • •
>
> Second. That, unless physically unable, he make application to register in his own handwriting, on a form which may be provided by the registration officer, without aid, suggestion, or other memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; and, • • •"

The provision was implemented by statutes. Virginia Code of 1950, sections 24-68, 24-71.

I

The Handwriting Requirement Of Virginia Code Section 24-252 Was Suspended By The Voting Rights Act Of 1965.

It is appellants' submission that the Virginia Statute which authorized the election officials not to count their ballots (Code section 24-252) was suspended on August 7, 1965 when Virginia was brought under the coverage of the Voting Rights Act of 1965. They seek an injunction and a declaratory judgment holding that statute invalid and restraining its enforcement on this statutory ground as well as on the constitutional grounds argued in Part II, *infra*. Appellants' constitutional argument involves the secrecy of the ballot. The Voting Rights Act argument does not turn on the secrecy issue but does strike at the state law which was used to invalidate appellants' ballots and thus supports their right to vote effectively and in secret.

Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. §1973b(a) (quoted *supra* pp. 5-6) provides that "no citizen shall be denied the right to vote . . . because of his failure to comply with any test or device." Section 4(c) of the Act, 42 U.S.C. §1973b(c) (*supra* p. 7), defines the phrase "test or device" to mean "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject. . . ." Section 14(c)(1) of the act, 42 U.S.C. §1973*l*(c)(1) (quoted at p. 9 above), defines the terms "vote" and "voting" to "include *all action necessary to make a vote effective . . . including,* but not limited to registration, listing pursuant to this Act, or other action required by law prerequisite to

voting, casting a ballot, and *having such ballot counted properly and included in the appropriate totals of votes cast . . .*" (emphasis added). Finally, section 11(a) of the Act, 42 U.S.C. §1973i(a) (quoted above, p. 9), prohibits a refusal to count the vote of anyone who is entitled to vote under the Act.

The court below held that the requirement of Va. Code section 24-252, that write-in votes be inserted in the voters "own handwriting," was not a "test or device" within the meaning of section 4 of the Voting Rights Act. The court seemed to rest its conclusion on the assertion that "[t]he requirement of [Va. Code §24-252] did not preclude the plaintiffs from registering or from voting" (268 F. Supp. at 221-222). This answer, we submit, is plainly insufficient. The appellants were precluded from voting, if "voting" is defined as in the Voting Rights Act and in normal usage to mean casting an effective ballot and having it counted. As indicated above, section 14(c)(1) of the Voting Rights Act of 1965 includes everything necessary to have a vote counted within the term "voting." Moreover, this usage is consistent with that in decisions of this Court over a long period of years. See *United States* v. *Mosely*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299, 315.

The opinion below seeks, in part, to avoid the thrust of appellants' argument that the handwriting requirement is a "test or device" under Section 4 of the Voting Rights Act by pointing to the fact that on October 15, 1965 the Board of Elections ordered election judges to aid illiterates. But this argument is not responsive to the question whether Section 24-252 was suspended as a matter of law on August 7, 1965 several months before the election board's reaction. If Section 24-252 was suspended, no basis for disallowing appellants' votes remains and they are entitled to an order enjoining its enforcement. There is no ground for conclud-

ing that Section 24-252 was only partially suspended, so as to save the last sentence which allows votes not to be counted.

The Court below did not discuss another question which was necessarily raised by its view of the October 15th bulletin as a sort of amendment of Virginia's voting laws. If this bulletin in effect replaced a suspended statute then the procedure set forth in the bulletin was also suspended automatically by another provision of the Voting Rights Act of 1965, e.g. Section 5. That provision suspends all new voting regulations in states covered by the Act pending review by federal authorities to determine whether their use would be racially discriminatory. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-335. The new Virginia procedure comes within Section 5 which refers to a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964" (42 U.S.C. §1973c). There is no allegation by the State that the October 15th bulletin was approved by the United States District Court for the District of Columbia, or was submitted to the Attorney General without objection as provided in Section 5 of the Voting Rights Act. Thus, in accord with Section 5 "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure."

Two additional comments should be made about the Board of Election's new procedure set forth in the October 15, 1965 bulletin. At first blush it seems to be an attempt to conform to and obey the Voting Rights Act, but this record shows that in practice it conditions the rights of illiterates to vote upon their willingness to divulge their votes to state election judges. The constitutionality of that condition is explored further in argument II below. Second, we submit that the reasonableness of the procedures must be

appraised from the standpoint of the illiterate voters. There is not any showing in this record that they had any way of even knowing about the new procedures set up in the election board's internal bulletin.

Application of the Voting Rights Act to suspend the handwriting requirement of Va. Code section 24-252, is fully in accord with the Congressional purpose, and should be adopted to support the policy of the Act. We urge four separate considerations which support the desirability of a ruling that Section 24-252 was suspended.

First, an interpretation of the Act to permit the handwriting requirement to continue in effect creates a plainly anomalous result, considering that it is conceded that the handwriting requirements for voter *registration* (contained in Virginia Constitution section 20, and in Virginia Code section 24-68) are suspended by the Voting Rights Act. The handwriting requirement of Code section 24-252, is not materially different from that in the other provisions and should also be suspended. Nothing in the Voting Rights Act supports the result of suspending two of the handwriting requirement laws and not suspending the third.

Second, this controversy involves the "manner of holding elections for Senators and Representatives," a matter which under the Constitution of the United States (Article I, section 4, clause 1) is committed to the ultimate control of the Congress. Congress is fully authorized under the Constitution to "make or alter" rules regarding the manner of conducting a federal election. A federal law intended to be protective of the right to vote in federal elections should be liberally construed as against a state enactment which narrowly and technically restricts the right to cast effective votes. As the whole area of federal election mechanics is committed to Congressional control there is no problem of infringement of States' rights underlying the controversy.

Third, the policy against rules which thwart the right to vote on the basis of the technicalities of state law has been stated very plainly by the Congress. The provisions of 42 U.S.C. §1971(a)(2)(B), forbid the denial of the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election." [5] There is no justification, in terms of administrative convenience, for disallowing ballots on such an overly technical ground as that used by appellees. As the Court said a few terms ago in another context involving a threat to the right to vote in *Carrington* v. *Rash*, 380 U.S. 89, 96:

> We deal here with matters close to the core of our constitutional system. "The right . . . . to choose," United States v. Classic, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. Oyama v. California, 332 U.S. 633.

Fourth, the appellants' use of stickers to indicate their votes was entirely reasonable under the circumstances and the States' invalidation of their ballots was unreasonable. The Voting Rights Act should be construed to block unreasonable measures which disfranchise voters where it may be reasonably construed to accomplish this end. The appellants were presented with a dilemma in the 1966 election; they face the same problem in future contests. They desired to vote write-in ballots for S. W. Tucker.

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[5] The right to "vote," in this statute also, includes "all action necessary to make a vote effective," including having the ballot "counted and included in the appropriate totals of votes cast." See 42 U.S.C. § 1971(a)(3)(A), incorporating the definition in 42 U.S.C. § 1971(e).

They also desired to keep their ballots secret. Virginia law, on the face of the statute books, still absolutely forbade them to vote except in their own handwriting. The statutes themselves made no exception for illiterates to be aided even by election judges. An Election Board bulletin directed election judges to aid them on request. But the Election Board had no power to enact any criminal law which might be a deterrent to a voting judge breaching a voter's confidence, and did not purport to do so. Thus, illiterates were not offered even the limited protections which were offered to handicapped and blind voters by Virginia Code section 24-251.[6] Voters who could not read had the problem, which physically handicapped voters did not have, of not having any available means of knowing whether or not the election judge was faithfully carrying out their directions. Blind voters were offered the option of being assisted by a trusted friend; appellants were not given this choice. Voters with physical handicaps other than blindness could at least observe and comprehend the actions of the election judges who cast their votes. Only illiterate voters were placed entirely at the mercy of election judges who were not even bound by any statute of the state to follow their instructions or keep their confidence. It is no sufficient answer here to say that it is presumed that the election

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[6] The existence of such criminal sanctions was thought by a Virginia court to be essential to the validity of a similar 19th century Virginia law which was challenged because of the threat to the secret ballot. *Pearson* v. *Board of Supervisors of Brunswick County*, 91 Va. 334, 21 S.E. 483 (1895). In *Pearson*, the Court sustained an 1894 Virginia law which included a provision that at the request of an elector physically or educationally unable to vote a special constable could aid him in preparing his ballot. The law was attacked as an infringement of the secret ballot. The Court acknowledged "that very great power is placed in the hands of this special constable, that a great trust is reported in him, and that wherever confidence is given it is liable to be abused" (*Pearson, supra*, 21 S.E. at 485). But, the Court sustained the law relying on the fact that the constables were "under the sanction of an oath" and were subject to "severe penalties" for violating their duties.

judges will function honestly and do their duties. The Voting Rights Act of 1965 was necessary precisely because all other efforts to halt racial discrimination *by voting officials* had failed. The Virginia statutes give election officials no directions and prescribe no duties for them with respect to aiding illiterates. Laws and procedures which gave state officials total discretion were a principal means of preventing Negroes from voting. *Louisiana* v. *United States*, 380 U.S. 145, 152-153. After the Voting Rights Act of 1965 was enacted, the United States found it necessary in some communities for federal observers to watch state officials while they assist illiterates in voting. See *United States* v. *Executive Com. of Dem. P. of Greene Co., Ala.*, 254 F. Supp. 543 (N.D. and S.D. Ala. 1966).

Appellants chose a reasonable method of solving their problem by using stickers to indicate their votes. As the court below acknowledged in its opinion, this is a method approved in a number of state courts (268 F. Supp. at 220). Of course, the state might prescribe some method other than the use of stickers, or permitting voters to be assisted by persons they choose, that would afford protection for the secrecy of the ballots of persons unable to write legibly. The complaint here is simply that Virgina has not furnished any such method. The Voting Rights Act should be construed so as to aid appellants in voting effectively and secretly. A finding that the Virginia handwriting requirement is suspended provides that protection for appellants.

As appellants made clear in the court below, they seek relief to protect their votes in future elections (R. 7-8, 69, 73). The future application of the Virginia rule will have a chilling effect on political participation by all illiterate persons who oppose the dominant political organization in an area. Illiterates who support unpopular candidates are the ones who will feel the pinch of Virginia's law. It will

take no great courage for an illiterate to seek help from an election judge when he wishes to vote for the State's dominant political forces. It may be another matter entirely when the illiterate supporter of a dissident minority candidate arrives at the polls in some areas of the Fourth Congressional District such as Prince Edward County Virginia. Cf. *Griffin* v. *School Board,* 377 U.S. 218.

Thus, for all these reasons, in addition to the plain language of the statute, the Voting Rights Act of 1965 should be construed to invalidate Virginia's statute permitting write-in ballots, to be discounted unless they are in "handwriting."

II

Virginia Code Section 24-252 Does Not Afford Appellants, Who Are Unable To Spell Accurately And Write Legibly, Equal Protection For The Secrecy Of Their Ballots.

Appellants seek protection for the secrecy of their ballots in federal elections. They object to a Virginia statute, which has been applied to deny them the opportunity to vote effectively for write-in candidates unless they are willing to disclose their votes to state election judges. They urge that the State denies them equal protection by failing to afford them any of the number of available procedures by which they might receive the same protections for the secrecy of their ballots which Virginia gives to voters who are able to write legibly and spell accurately. Indeed, they are not even given the protection available for blind voters, e.g., the right to be aided by someone other than an election judge if they choose.

As we have pointed out earlier, Virginia's Constitution protects the secrecy of the ballot (Constitution of Virginia,

section 27), and for literate voters there is, in the words of the Constitution, "absolute secrecy." The right to a secret ballot also finds support in relevant federal law. Congress enacted the law now codified as 2 U.S.C. §9 nearly 100 years ago. This section (quoted *supra* at p. 5) requiring that all votes in congressional elections be "by written or printed ballot" has been construed to require a *secret* ballot. See *Johnson* v. *Clark*, 25 F. Supp. 285 (N.D. Tex. 1938); cf. *Voorhes* v. *Dempsey*, 231 F. Supp. 975 (D. Conn. 1964).

It seems rather clear that when the Congress enacted 2 U.S.C. §9, in 1871, it intended to provide a secret ballot as opposed to the *viva voce* method of voting. During the debates on the Act (the provision was originally section 19 of the Act of February 28, 1871, 16 Stat. 440, c. 99, §19) Congressman Bingham said: "What objection can there be to the ballot? . . . It occurs to me that there is but a single State in the Union to-day that tolerates the old method of voting viva voce." Cong. Globe, 41st Cong., 3d Sess. 1284 (1871). Secrecy was clearly a part of the contemporary 19th Century understanding of the word ballot as evidenced by judicial usage. For example, as the Court stated in *In re Massey*, 45 F. 629, 634-635 (E.D. Ark. 1890):

> That the word "ballot" implies secrecy is unquestioned, and, if it was provided that the election shall be by ballot, and nothing further was said, then it would be without doubt the right of the elector to have the secrecy of the ballot preserved from impertinent or improper inspection . . .

The objective of the 41st Congress was to introduce the authority of the federal government into the fight to secure and preserve the integrity of federal elections. It could not but have concurred in the conclusion which had

been reached by the majority of State legislatures that secrecy, as the fundamentally distinguishable characteristic of voting by ballot, was an efficacious tool to enlist in the war against a variety of electoral evils being practiced throughout the country.[7]

Moreover, the right of a secret ballot is obviously bound up in a close relationship with the right of privacy of association for the advancement of political beliefs which is plainly protected by the Constitution. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449; *Talley* v. *California,* 362 U.S. 60; *Shelton* v. *Tucker,* 364 U.S. 479; *Bates* v. *Little Rock,* 361

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[7] The attitude of the majority of states on the efficacy of secrecy has been succinctly summarized:

"Absolute secrecy in voting reaches effectively a great number of evils, including violence, intimidation, bribery and corrupt practice, dictation by employers or organizations, the fear of ridicule and dislike or of social or commerce injury—in fact all coercive and improper influence of every sort depending on a knowledge of the voter's political action." *Taylor* v. *Bleakley,* 55 Kan. 1, 39 P. 1045 (1895).

That the 41st Congress was confronted with many of these evils emerges from the debate on 2 U.S.C. § 9:

"A few words as to its [the act's] necessity . . . we all know that Ku Klux outrages have been committed, not only in North Carolina . . . but in other states of the South; and that in more than one city of this Union enormous frauds have been perpetrated upon the ballot box . . ." Cong. Globe, 41st Cong. 3d Sess. 1275 (1871) (Remarks of Rep. Churchill).

"Your 'repeaters,' your 'ballot-box stuffers,' your 'Ku Klux Klans,' intimidation of loyal citizens—these and numberless other agencies of wrong and fraud on the ballot, overturning the power and will of the people, will continue to run riot in the land unless prevented by some such legislation as this . . . We have seen the electors of states defrauded out of the honest expression of their choice of candidates at the ballot-box, and in others we have seen similar results from terrorism, intimidation, and violence." *Id.* at 1276 (Remarks of Rep. Lawrence).

"The object of the bill is very manifest, and in my judgment just as it is manifest. It is to prevent, under the law and by virtue of the law, any violation of the rights of the citizen by fraud or corruption on the part of any one to whom is intrusted the conduct of the election or the registration of voters." *Id.* at 1284 (Remarks of Rep. Bingham).

U.S. 516. Accordingly, any state invasion of the privacy of the ballot must be justified by some compelling showing. "Where there is a significant encroachment upon personal liberty the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker, supra*, 364 U.S. at 488.

Quite plainly, the secret ballot is a valuable privilege which cannot be denied or infringed on a discriminatory basis. The Virginia discrimination against illiterates serves no overriding governmental purpose which can justify the differential treatment. It should be noted that the Virginia statutes contain no specific and direct prohibition against the use of voting stickers. The appellees found the prohibition implied from the requirement that write-in candidates' names be inserted in the voter's own handwriting, Va. Code §24-252. But the Virginia election officials are apparently quite prepared to accept the handwriting of an election judge in lieu of the voter's handwriting, just as the Virginia laws accepts the handwriting of any friend brought into the voting booth by a blind voter. The state's legislative and administrative scheme shows no consistent concern for whose handwriting appears on the ballot; only a concern that names be inserted in someone's handwriting. But there has been no showing or argument forthcoming from the State which demonstrates why the State has such a great interest in the insertion being done in handwriting as opposed to printing or some other method, or why the subscription for illiterates must be done in the handwriting of an election judge and not by some other person who is not a state official. The State has not carried the burden of

demonstrating that the handwriting requirement is so "necessary to the proper administration of its election laws" that the interest may be elevated above the constitutionally protected right of a citizen to vote and have his vote counted. *Harman* v. *Forssenius,* 380 U.S. 528, 543. The handwriting requirement is merely a remaining vestige of Virginia's long-lived system of enforcing a literacy prerequisite for voting, a system designed from its inception to prevent Negroes from voting. *Harman* v. *Forssenius, supra,* 380 U.S. at 543.

The opinion below states that illiterates have no Fourteenth Amendment right to vote and apparently concluded from this proposition that discrimination against illiterates does not violate the Fourteenth Amendment (268 F. Supp. at 220). But illiterates now have a right to register and vote in Virginia under the Voting Rights Act, which was made applicable to the State under the congressional formula designating those states where literacy tests had been used to discriminate against Negroes. An unjustifiable discrimination among those equally entitled to vote under the operative law establishing voting qualifications is nonetheless a denial of equal protection of the laws whatever might be the rule if voting qualifications were different. When the law affords a right it must be afforded on equal terms. The State should not be permitted to invade the right of a secret ballot where there are plainly available methods which can assure voters' privacy from state election officials.

CONCLUSION

It is respectfully submitted that this case presents substantial questions which justify full briefing and plenary consideration by the Court.

Respectfully submitted,

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APPENDIX

Opinion by Butzner, *D.J.*

UNITED STATES DICTRICT COURT

E. D. VIRGINIA

RICHMOND DIVISION

May 2, 1967

Civ. A. No. 5041

RICHARD ALLEN, LENA W. DUNN, WASHINGTON MOORE, MCKINLEY DUNN, NORA TYLER, JAMES GILBERT TYLER, FANNIE M. BROWN, PATRICK H. BROWN and JAMES DONIKENS,

Plaintiffs,

v.

STATE BOARD OF ELECTIONS, MARK GRIZZARD, FOREST LANKFORD, BENJAMIN GRIFFIN, ROBERT E. GARNETT, J. S. LIPSCOMB, THOMAS BROWN and PAUL BELL,

Defendants.

MEMORANDUM OF THE COURT

Before BRYAN and WINTER, *Circuit Judges,* and BUTZNER, *District Judge.*

BUTZNER, *District Judge:*

The plaintiffs, registered voters who are unable to spell accurately or to write legibly, attempted to cast their votes for a write-in candidate in the 1966 congressional election. Each pasted a sticker, upon which the write-in candidate's name was printed, on the official ballot

under the names of listed candidates and appropriately marked the ballot immediately preceding the sticker. These ballots were not tabulated for the write-in candidate. Upon these undisputed facts, the plaintiffs seek a declaratory judgment that the Fourteenth Amendment's equal protection clause and the Voting Rights Act of 1965 (42 U.S.C. § 1973 et seq.) invalidates § 24-252, Code of Virginia 1950, insofar as this section denies to any voter, solely because of his inability to write, the privilege of casting a secret ballot for a candidate whose name is not printed on the official ballot. The plaintiffs pray that the defendants be enjoined from refusing to count any vote because the candidate's name was inserted on the official ballot by means other than the voter's handwriting. We conclude that the relief sought by the plaintiffs should be denied.

Pertinent provisions of the Virginia Constitution are:

> "§ 27: *Method of Voting.*—All elections by the people shall be by ballot; • • •
>
> "The ballot box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed or counted, in secret.
>
> So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained."
>
> "§ 28. *Ballots.*—The General Assembly shall provide for ballots without any distinguishing mark or symbol, for the use in all State, county, city and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candi-

dates and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another."

Section 24-252, Code of Virginia 1950, provides:

> *"Insertion of names on ballots.*—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) or a line (−) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

The propriety of stickers is a matter for legislative, not judicial determination. Arguments for and against their use abound. Stickers have been lauded for facilitating voting and denounced as conducive to fraud and confusion. Their use has been approved under statutes permitting write-ins. Pace v. Hickey, 236 Ark. 792, 370 S.W. 2d 66 (1963); O'Brien v. Board of Elections Comm'rs, 257 Mass. 332, 153 N.E. 553 (1926); Dewalt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771 (1892); State on Complaint of Tank v. Anderson, 191 Wis. 538, 211 N.W. 938 (1927). Illinois forbade their use, Fletcher v. Wall, 172 Ill. 426, 50 N.E. 230, 40 L.R.A. 617 (1898), and the constitutionality of this ban has been upheld. Blackman v. Stone, 101 F.2d 500, 504 (7th Cir. 1939).

The plaintiffs' contention that § 24-252 violates the Fourteenth Amendment because it discriminates against

illiterates is not supported by authority. To the contrary, exclusion of illiterate persons from voting, if no other discrimination is practiced, does not violate the Fourteenth Amendment.

In Lassiter v. Northampton Election Bd., 360 U.S. 45, 51, 79 S.Ct. 985, 990, 3 L.Ed.2d 1072 (1959), the Court said:

> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record • • • are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. • • • It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. • • • North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards."

Lassiter warns that "* * * a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." 360 U.S. 53, 79 S.Ct. 991. No evidence has been presented that Virginia's prohibition of stickers had been administered in a discriminatory manner. It has not been used to disfranchise any class of citizens. We conclude that § 24-252 does not violate the Fourteenth Amendment by discriminating between literate and illiterate voters.

The equal protection clause of the Fourteenth Amendment and the Fifteenth Amendment are not the only standards by which state legislation governing the franchise must be measured. State laws affecting the right of suffrage must not contravene "* * * any restriction that Congress, acting pursuant to its constitutional powers, has imposed." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169 (1966); Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1731, 16 L.Ed.2d 828 (1966). The plaintiffs urge that requiring the name of the write-in candidate to be inserted in the voter's own handwriting violates the Voting Rights Act of 1965 (42 U.S.C. § 1973 et seq.). The constitutionality of pertinent sections of the Act is not in dispute. Cf. State of South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

Virginia is subject to the Act, 42 U.S.C. § 1973b(b). Until the state is removed from the Act's provisions, all tests or devices for determining eligibility to vote are suspended. 42 U.S.C. § 1973b(a).

The plaintiffs rely on these sections of the Act:

42 U.S.C. § 1973[1] (a):

> "* * * no citizen shall be denied the right to vote in any Federal, State, or local election because of his

failure to comply with any test or device in any State * * * ."

42 U.S.C. § 1973b(c):

"The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

42 U.S.C.A. § 1973i(a):

"No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote."

Section 24-251, Code of Virginia 1950, authorizes a judge of election, upon request, to assist a physically handicapped voter prepare his ballot, and allows a blind voter to be aided by a person of his choice. The assistants are enjoined to secrecy. For any corrupt violation of their duties, they may be punished by confinement in jail for not less than one nor more than twelve months. No provision was made for helping an illiterate person because under Virginia law all voters had to demonstrate ability to read and write.

After the enactment of the Voting Rights Act of 1965, Virginia directed its registrars to help illiterate persons

register. The Board of Elections recognized that illiterates might need assistance with their ballots. For this reason, it instructed all judges of election:

> "On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.
>
> These instructions also apply to precincts in which voting machines are used."

The Attorney General of Virginia asserted, and the plaintiffs do not controvert, that these instructions apply while the Voting Rights Act of 1965 is effective in the state.

The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. § 1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. Under present Virginia statutes and regulations of the

Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled.

Judgment will be entered for the defendants.

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 5041

RICHARD ALLEN, LENA W. DUNN, WASHINGTON MOORE, MCKINLEY DUNN, NORA TYLER, JAMES GILBERT TYLER, FANNIE M. BROWN, PATRICK H. BROWN and JAMES DONIKENS,

Plaintiffs,

v.

STATE BOARD OF ELECTIONS, MARK GRIZZARD, FOREST LANKFORD, BENJAMIN GRIFFIN, ROBERT E. GARNETT, J. S. LIPSCOMB, THOMAS BROWN and PAUL BELL,

Defendants.

For reasons stated in the opinion of the court this day filed;

It is ADJUDGED AND ORDERED that the prayer of the plaintiffs' complaint is denied, the complaint is dismissed, and the action is stricken from the docket with costs taxed against the plaintiffs.

May 2, 1967

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ HARRISON WINTER
United States Circuit Judge

/s/ JOHN D. BUTZNER, JR.
United States District Judge

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IN THE SUPREME COURT
OF THE UNITED STATES

NO._____

----------X

J. C. FAIRLEY, ALVIN WILLIAMS, JAMES FLUKER, REV. WALTER L. RUSSELL, JAMES BONNE and STEPHEN LEE GRADY, on behalf of themselves and all other persons similarly situated,

Appellants,

-vs-

JOE T. PATTERSON, Attorney General of the State of Mississippi; W. V. SIGLER, ALBERT S. WOODS, JR., SELBY C. BOWLING, J.A.P. CARTER, JR. and HERBERT H. LEE, as members of the Board of Supervisors of Forrest County; MRS. D. O. SEGREST, MRS. FRED BLACKWELL, and G. C. SIMMONS, as County Election Commissioners for Forrest County,

Appellees.

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LEVI MARSAW, III and MAMIE MAZIQUE, on behalf of themselves and all other persons similarly situated,

Appellants,

-vs-

JOE T. PATTERSON, Attorney General of the State of Mississippi; ARLIE C. WARREN, BOYD SOJOURNER, JAMES H. CARTER, J. W. BROWN and F. L. CALLON, as members of the Board of Supervisors of Adams County; ROBERT V. WOLCOTT, JAMES T. O'NEILL and ALMA D. MADDOX, as County Election Commissioners for Adams County,

Appellees.

----------X

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the United States District Court for the Southern District of Mississippi are not yet reported. The text of said opinions is contained in

Appendix A hereto.

JURISDICTION

(1) These proceedings seek declaratory judgments that Section 2870 of the Mississippi Code, as amended, comes within the purview of the Voting Rights Act of 1965 (42 U.S.C., Section 1973) and 42 U.S.C., Section 1971; permanent injunctions against the application and enforcement of said Section 2870 by certain county Boards of Supervisors; and permanent injunctions against the election of members of certain county Boards of Supervisors pursuant to or in accordance with the provisions of Section 2870, as amended, or any order of certain Boards of Supervisors until such time as the Voting Rights Act of 1965 has been complied

with, or the procedures set forth in Section 2870 prior to its amendment in 1966 followed.

Jurisdiction was conferred on the court below by 28 U.S.C., Sections 1343(3) and (4), and 2201 and 2202, and by 42 U.S.C., Sections 1971(d) and 1973(j) and (f). A district court of three judges was required to be convened by 28 U.S.C., Section 2281 and 42 U.S.C., Section 1973c.

(2) The judgment herein sought to be reviewed was entered in each case on October 5, 1967, and the Notice of Appeal in each case was filed on November 28, 1967, with the United States District Court for the Southern District of Mississippi.

(3) The Supreme Court has juris-

diction of this direct appeal pursuant to 28 U.S.C., Section 1253 and 42 U.S.C., Section 1973c.

(4) There are no cases specifically dealing with appeal pursuant to 28 U.S.C., Section 1253 and 42 U.S.C., Section 1973c from a three judge court decision pursuant to the Voting Rights Act of 1965 (42 U.S.C., Section 1973). This appeal fits so closely within the terms of the cited statutes, however, as to need no precedents to sustain jurisdiction. The last sentence of Section 5 of the Voting Rights Act of 1965 provides that "any action under this section shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court."

(5) Section 2870 of the Mississippi Code of 1942, prior to its amendment in 1966, may be found in volume 3 of the Mississippi Code, at pages 4-5. The 1966 amendment to Section 2870 is reported in the 1966 supplement to volume 3 of the Mississippi Code at pages 14-15. The text of this statute before and as amended is set forth in Appendix B.

QUESTIONS PRESENTED

(1) Whether the District Court erred:

(a) In finding that Section 2870 of the Mississippi Code, as amended by the 1966 session of the Mississippi Legislature does not come within the purview of and is not covered by Section 5 of the

Voting Rights Act of 1965 (42 U.S.C., Section 1973c) (hereinafter "Section 5") so as to require compliance with said Section 5 by the State of Mississippi and the counties involved in each of the cases herein on appeal, prior to enforcing or applying Section 2870 as amended; and

(b) In dismissing each of the complaints, thereby denying the relief requested therein.

(2) Whether, the November 7, 1967, election in each of the counties herein involved having been held in accordance with Section 2870 as amended (i.e., election for County Boards of Supervisors

having been held at large rather than by districts), this Court, if it finds that Section 5 of the Voting Rights Act of 1965 should have been complied with as aforesaid, should order an election of such County Boards of Supervisors pursuant to the provisions of Section 2870 prior to its amendment in 1966.

STATEMENT OF THE CASE

These cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 2870 of the Mississippi Code. Each county in Mississippi is governed in important respects by a Board of Supervisors composed of five (5) members. Each county is divided into five (5) districts for purposes of election of certain county officials. Prior

having been held at large rather than by districts, this Court, if it finds that Section 5 of the Voting Rights Act of 1965 should have been complied with as aforesaid, should order an election of such County Boards of Supervisors pursuant to the provisions of Section 2870 prior to its amendment in 1960.

STATEMENT OF THE CASE

These cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 2870 of the Mississippi Code. Each county in Mississippi is governed in important respects by a Board of Supervisors composed of five (5) members. Each county is divided into five (5) districts for purposes of election of certain county officials. Prior

to May 27, 1966, each of the members of the Board of Supervisors in each of the Counties of Mississippi, including Adams and Forrest Counties (the counties bringing the appeal herein) were elected only by the qualified electors of one particular district, pursuant to Section 2870 of the Mississippi Code.

Effective May 27, 1966, the Legislature of Mississippi amended the aforesaid Section 2870 to provide that members of the County Board of Supervisors could, at each County's option, be elected at large, i.e., all the qualified electors of the county would be eligible to vote for each member of the Board of Supervisors, rather than by the means in force and effect November 1, 1964. Adams and

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the Board of Supervisors in each of the
Counties of Mississippi, including Adams
and Forrest Counties (the counties bring-
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of the county would be eligible to vote
for each member of the Board of Super-
visors, rather than by the means in force
and effect November 1, 1954. Adams and

Forrest Counties exercised such options and held the 1967 election of Supervisors at large.

The Voting Rights Act of 1965 (42 U.S.C., Section 1973) applies to Mississippi and provides in Section 5 that whenever a State or political subdivision thereof:

> "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964," (42 U.S.C., Section 1973c)

such State or political subdivision cannot enforce or apply such change until it has either (1) instituted an action in the United States District Court for the District of Columbia for a declaratory

Forrest Counties exercised such options and held the 1967 election of Supervisors at large.

The Voting Rights Act of 1965 (42 U.S.C., Section 1973) applies to Mississippi and provides in Section 5 that whenever a State or political subdivision thereof:

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such State or political subdivision cannot enforce or apply such change until it has either (1) instituted an action in the United States District Court for the District of Columbia for a declaratory

judgment that

> "such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C., Section 1973c)

and such judgment has been entered, or (2) submitted the change to the Attorney General of the United States and had no objection interposed by the Attorney General within 60 days after such submission.

Neither the State of Mississippi, nor any of its officials, nor Adams or Forrest counties, nor any of their officials has instituted any action in the United States District Court for the District of Columbia with respect to Section 2870 of the Mississippi Code, as

judgment that

"such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." (42 U.S.C. Section 1973c)

and such judgment has been entered, or

(2) submitted the change to the Attorney General of the United States and has not objection interposed by the Attorney General within 60 days after such submission.

Neither the State of Mississippi, nor any of its officials, nor Adams or Forrest Counties, nor any of their officials has instituted any action in the United States District Court for the District of Columbia with respect to Section 2870 of the Mississippi Code, as

amended, nor submitted such amended Section to the Attorney General of the United States.

Plaintiffs in each of the two suits herein seek to have the amendment to Section 2870 of the Mississippi Code declared such a change in qualification, prerequisite, standard, practice or procedure, within the purview of Section 5 of the Voting Rights Act of 1965, as to require defendants to comply with Section 5. The District Court in each of the cases held that the amendment did not come within the purview of and is not covered by the Voting Rights Act of 1965, and dismissed the complaints herein.

SUBSTANTIALITY OF QUESTIONS

The Voting Rights Act of 1965 (42

U.S.C., Section 1973) (hereinafter "Section 5") was designed to prevent states and political subdivisions with a history of avoiding the mandate of the Fifteenth Amendment to the Constitution of the United States from so doing, and to prevent such practices prior to their becoming effective.

The constitutionality of Section 5 has been upheld in South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966):

> "Congress knew that some of the States covered by Section 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees (footnote omitted). Congress had reason to suppose that

> these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner (by enacting Section 5)."

Section 5 is triggered when, by its own provisions, there is any change in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964 . . ." It is a fundamental precept of statutory construction that the words of a statute are to be given their ordinary meaning. The quoted words could hardly be broader in scope. This breadth of meaning is reinforced by the definition

of "voting" provided by Section 14(c)(1) of the Voting Rights Act of 1965 (42 U.S.C., Section 1973 l (c)(1)) as including "all action necessary to make a vote effective in any primary, special or general election . . ." (Emphasis added.) A broad, rather than a narrow interpretation, is given further support by the fact that Section 5 is meant to prevent not only denial by a state of the right to vote, but also abridgment of the right to vote.

The legislative history of Section 5 similarly shows that Section 5 was intended to cover a wide range of state provisions. The Attorney General of the United States testified that "two or three" types of state law could be written

out of the section, but "there are precious few, because there are an awful lot of things that could be started for the purpose of evading the 15th Amendment if there is a desire to do so." (Mr. Katzenbach, House Hearings, p. 95) Earlier in the hearing, he gave examples of changes which would not be covered -- changes in voting age, residence requirements, and balloting procedures such as changing from paper ballot to machines (he expressed some reservations if the change was from machines to paper). (Mr. Katzenbach, House Hearings, pp. 61-62) In the Senate hearings, the Attorney General accepted a change by Senator Fong to include in the section the language "standards" and "practices". (Senate Hearings, p. 192)

The Senator thought the change would broaden the section to make it all-inclusive. The Attorney General thought the section all-inclusive even without the change. (Senate Hearings, pp. 191-92)

The overall purpose of the Voting Rights Act and the specific purpose of Section 5 was to eliminate and prohibit practices and procedures which would perpetuate the effects of discrimination in the election process. In Section 5, Congress sought to prevent state legislatures from raising new barriers of discrimination. Past experience had defined the need for such a remedy.

> "Mr. Katzenbach: The justification is simply this: Our experience in the areas that would be covered by this Bill has

> been such as to indicate frequently on the part of state legislatures a desire in a sense to outguess the Congress of the United States. I refer, for example, to the new voter qualifications that have been put into statutes of Louisiana, Mississippi and Alabama following the enactment of the 1964 Act which made things more difficult for people to vote . . . .
>
> "The same thing was true, as the Chairman may recall, in Louisiana at the time of the initial school desegregation, where the legislature passed I don't know how many laws in the shortest period of time. Every time the judge issued a decree, the legislature . . . passed a law to frustrate that decree." (House Hearings, p. 60)

In the time it would take for the Government to learn about such newly adopted procedures (Mr. Marshall, House Hearings, p. 72) and litigate their

validity, the new statutes would have done their damage (Mr. Katzenbach, Senate Hearings, p. 237). Thus, the remedy of Section 5 was, basically, to require federal scrutiny of such statutes in the area of voting before they could be put into effect.

To those familiar with the past history of discriminatory voting legislation in Mississippi, the need for such protection as Section 5 provides is readily apparent. See, e.g., United States v. Mississippi, 380 U.S. 128, 135-136 (1965):

> "It is apparent that the complaint . . . charged a long standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which

> the registration statistics . . . would seem to show had been remarkably successful."

Congress and the courts have consistently noted the pattern of discrimination in Mississippi and the purpose behind its voting legislation. The Supreme Court in commenting on the Voting Rights Act of 1965 in South Carolina v. Katzenbach, supra, said:

> "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the elector process in parts of our country for nearly a century." Id. at 308.

and again,

> "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in

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> "(S)ome of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration (specifically referring in n. 19 at this point to the Mississippi Legislature)." Id. at 314.

Having proved the overwhelming history of past problems of discrimination and legislative purpose, it is hornbook law that a presumption arises that facts or conditions once proven are deemed to continue to exist unless proven otherwise. Allstate Finance Corp. v. Zimmerman, 330

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Having proved the overwhelming history of past problems of discrimination and legislative purpose, it is hornbook law that a presumption arises that facts or conditions once proven are deemed to continue to exist unless proven otherwise. Allstate Finance Corp. v. Zimmerman, 330

F.2d 740 (5th Cir. 1964); NLRB v. Piqua Munising Wood Prods. Co., 109 F.2d 552 (6th Cir. 1940); 2 Wigmore, Evidence, Section 437 (3d ed. 1940).

This doctrine has been specifically adopted in discrimination cases as in Cassell v. Texas, 339 U.S. 282, 293 (1950), where Mr. Justice Reed stated:

> "If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose."

Thus, in Sellers v. Trussell, 253 F. Supp. 915 (M. D. Ala. 1966), the only case to consider Section 5 to date, in

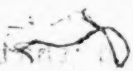
concluding that an Alabama election statute had a purpose of racial discrimination, Judge Johnson gave practical effect to the foregoing presumption when he discussed the history of voting discrimination against Negroes in Alabama and reasoned that:

> "Any determination in this case of legislative motive must be viewed in this light. Viewing Act 536 in such light, leads me . . . to the firm conclusion that its introduction and passage was racially motivated." 253 F. Supp. at 919.

Taking away from the qualified electors of certain counties in the state their right to vote by districts is a change in standard, practice or procedure with respect to voting, and is well within the

purview of Section 5. This is such an "abridgment" of the right to vote as was found in Sellers v. Trussell, supra, to be within the contemplation of Section 5.

In Sellers, Judge Rives concluded that a statute extending the terms of county commissioners in Bullock County, Alabama, from 4 to 6 years was covered by Section 5 and, because Alabama had failed to comply with the requirements of Section 5, was in violation thereof. (Judge Johnson found it unnecessary to reach that question, and Judge Grooms dissented.) Suspension of the right to vote for two years is no more of a change than the dilution of the effectiveness of one's vote herein. If the amendment in question herein is not held to be within the



language of the Voting Rights Act of 1965, then the Act will be a dead-letter law in that it will provide no remedy against discrimination and abuse of the elective processes except in the most simple and obvious case.

It take no great imagination to conceive of the potential for racial discrimination which underlies the amendment to Section 2870 of the Mississippi Code, making the post of County Supervisor elective county-wide rather than by districts.

After the invalidation of the poll tax requirements to voting, and after federal registrars were sent to Mississippi, large numbers of previously unregistered Negroes were able to register to vote. For the first time since Reconstruction,

25.

a substantial number of Negro citizens of the State of Mississippi have attempted to or have actually become candidates for county offices. Negro citizens have become aware of their voting power to elect or to swing an election for the candidates of their choice.

The amendment to Section 2870 could be found to have the purpose and effect of denying or abridging the right to vote on account of race or color, by preventing the election of Negro candidates to county Boards of Supervisors by allowing members of county Boards to be elected at large in counties in which there is a county-wide white voting majority, but in which there is a Negro voting majority in one or more individual super-

visors' districts.

Similarly the amendment could make it more difficult for Negro voters to swing an election for a candidate of their choice in that it forces them (a large number of whom are illiterate) to bear in mind the names of five candidates for supervisor rather than one. With respect to illiterates, the courts have said in discussing the Voting Rights Act of 1965, "We agree that the obvious sense of Congress is to assure not just registration, but the full exercise of the right to vote itself. Indeed, the Act defines 'vote' or 'voting' in terms of any and 'all action necessary to make a vote effective in any . . . election . . . /including/ . . . casting a ballot'."

United States v. Mississippi, 256 F. Supp. 344, 348 (S. D. Miss. 1966) (Three Judge Court).

Other potentials for discrimination in the amendment to Section 2870 could readily be imagined.

It is to be kept in mind that appellants herein are not asking that the amendment itself be declared unconstitutional. They are merely asking that the state or counties involved comply with the Voting Rights Act of 1965, under which either the Attorney General of the United States or the District Court for the District of Columbia may make a determination as to the discriminatory purpose and effect of the amendment prior to its becoming effective. The amendment in question is

exactly the kind of change which the Voting Rights Act contemplated should be reviewed in order to prevent devious dilution and withdrawal of the right to vote on account of race or color.

It is no accident that Section 5 places the burden of proof of nondiscriminatory purpose and effect upon the covered State. From the foregoing discussion, one can reasonably conclude that Section 2870 might well in fact be used to discriminate against the Negro, for racial discrimination in a State such as Mississippi has been so pervasive and has so infected the processes of Government, especially in the area of voting rights. See, e.g., United States v. Mississippi, 359 F.2d 103 (5th Cir. 1966); United States v.

Ramsey, 353 F.2d 650 (5th Cir. 1965); United States v. Lynd, 349 F.2d 785 (5th Cir. 1965); United States v. Ward, 345 F. 2d 857 (5th Cir. 1965).

Therefore, it is fitting that the State of Mississippi assume the burden of demonstrating that Section 2870 "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

The scope of the language "voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting" has never been construed by an appeal court. An authoritative construction of the above language is essential to the validity of the Voting Rights Act and protection of the right to

vote and the strength of that vote.

Date: January 24, 1968

Respectfully submitted,

DENISON RAY
LAWRENCE ASCHENBRENNER
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Appellants

APPENDIX A

IN THE UNITED STATES

DISTRICT COURT FOR THE

SOUTHERN DISTRICT

OF MISSISSIPPI

WESTERN DIVISION

LEVI MARSAW, III, ET AL PLAINTIFFS

VS. CIVIL ACTION NO. 1201W

JOE T. PATTERSON ET AL DEFENDANTS

O R D E R

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole

question for determination being whether or not Section 2870 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 2870, as amended by the legislature of Mississippi at its regular session of 1966, does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C., and that plaintiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in

this action be, and the same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

Acting For and on Behalf of The Court

A TRUE COPY, I HEREBY CERTIFY.
ROBERT C. THOMAS,
CLERK

BY:
/s/ Ruby L. Short
Deputy Clerk

Dated 10/8/67

* * * * * * * * *

* * * * * * * * * *

IN THE UNITED STATES

DISTRICT COURT FOR THE

SOUTHERN DISTRICT

OF MISSISSIPPI

HATTIESBURG DIVISION

J. C. FAIRLEY, ET AL PLAINTIFFS

VS. CIVIL ACTION NO. 2205H

JOE T. PATTERSON, ET AL. DEFENDANTS

ORDER

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether

or not Section 2870 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 2870, as amended by the legislature of Mississippi at its regular session of 1966, does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C., and that plaintiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in this action be, and the same is, hereby,

denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

Acting For and on Behalf of The Court

* * * * * *

APPENDIX B

"Section 2870.* Districts and boundaries.

Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one (1) member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed, or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and/or more than fifty per cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

~~Provided-further,-however,-that-in-any-county-in the-state-bordering-on-the Gulf-of-Mexico-or-Mississippi Sound-and-having-a-population in-excess-of-eighty-thousand (80,000)-according-to-the last-federal-census,-the issue-of-election-heretofore-provided-for-shall-be determined-by-a-majority-of the-qualified-electors-of-the county,-and-if-such-majority fail-to-vote-affirmatively, no-new-petition-shall-be considered-for-four-(4)-years.--Each-such-election shall-be-based-upon-a-petition-of-twenty-five-per cent-(25%)-of-the-qualified electors-of-the-county,-and to-which-petition-shall-be attached-a-map-or-plat-defining-the-boundaries-of each-beat-as-proposed-by said-map-or-plat,-and-the election-thereon-shall-be on-such-proposal.~~

~~And-the-board,-whenever a-majority-of-the-qualified electors-of-the-county-shall have-voted-to-change-or-alter the-existing-districts-to these-set-forth-and-described~~

~~in-the-petition,-shall-at its-first-meeting-thereafter establish-said-proposed districts-by-order-on-its minutes,-to-be-effective-on the-first-day-of-January following,-and-in-default thereof,-may-be-commanded-to do-so-by-writ-of-mandamus.~~

~~When-the-districts-are changed,-by-the-qualified electors-in-an-election-as aforesaid,-the-board,-of-its own-motion,-shall-not-change or-alter-said-districts-within-four-(4)-years-thereafter.~~

The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next general election wherein said

supervisors are elected.

If twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter

supervisors are elected.

11. twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final validation of any such alternative method, then the board of supervisors shall call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the county's electorate of the county shall be required to vote for the members of the board of supervisors at large or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter

all elections for members of boards of supervisors shall so be held. If not, members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of boards of supervisors again until two (2) years have transpired.

This act shall not be construed to effect any supervisors now holding office until the expiration and end of his present term of office."

---

*Material crossed out was deleted, and material underlined was added.

all elections for members of boards of supervisors shall also be held. If not, members of the boards of supervisors shall continue to be elected by the districts of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of boards of supervisors again until two (2) years have transpired.

This act shall not be construed to affect any supervisor now holding office until the expiration and end of his present term of office.

Material crossed out was deleted, and material underlined was added.

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed via United States mail, postage prepaid, a copy of the foregoing Jurisdictional Statement of Appellants to:

Attorney General Joe T. Patterson
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January , 1968.

DENISON RAY
233 North Farish Street
Jackson, Mississippi 39201

OCTOBER [illegible]

NO. [redacted] 26

CHARLES E. BUNTON, et al.,
Appellants,

-vs-

JOE T. PATTERSON, et al.,
Appellees.

ON APPEAL FROM A DISTRICT
COURT OF THREE JUDGES

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

Jurisdictional Statement of Appellants

DENISON RAY
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

NO._____

CHARLES E. BUNTON and WILLIAM ROSS, on behalf of themselves and all other persons similarly situated,

Appellants,

-vs-

JOE T. PATTERSON, Attorney General of the State of Mississippi; GROVER GOODWIN, DR. FRANK HEADLEY, ROBERT TEMPLETON, HAROLD BARLAND and ETHAN PORTER, as members of the Board of Education of Claiborne County; JOHN CADE, ORIN R. SEGREST, JR. and L. B. ALLEN, JR., as County Election Commissioners for Claiborne County,

Appellees.

VERNON TOM GRIFFIN, ROBERT COOPER HOWARD, CORNELIUS BROOKS, LUCAS SIMS, ED McGRAW, JR., THOMAS C. JOHNSON and JOHN LOVIE, on behalf of themselves and all other persons similarly situated,

Appellants,

-vs-

JOE T. PATTERSON, Attorney General of the State of Mississippi; W. B. KENNA, W. H. McKENZIE, JR., HOMER E. CHISHOLM, M. L. SMITH and JAMES BARRETT, as members of the Board of Education of Holmes County; MRS. HATTIE MAUDE FARMER, ED WILLIAM MOSES and MRS. JULIETTE GARLAND, as County Election Commissioners for Holmes County,

Appellees.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

NO. _____

CHARLES [illegible] BUNTON and WILLIAM ROSS, on behalf of themselves and all other persons similarly situated,

Appellants,

-vs-

JOHN [illegible], Attorney General of the State of Mississippi; GROVER GOODWIN, DR. [illegible]; ROBERT TEMPLETON, HAROLD [illegible] and [illegible] POHLER, as members of the Board of Education of Claiborne County; [illegible] ORTH R. SECREST, JR. and [illegible], JR., as County Election Commissioners for Claiborne County,

Appellees.

VERNON TOM [illegible], ROBERT COOPER HOWARD, CORNELIUS BROOKS, LUCAS SIMS, ED McGRAW, JR., THOMAS [illegible] JOHNSON and JOHN LOVIE, on behalf of themselves and all other persons similarly situated,

Appellants,

-vs-

JOE T. PATTERSON, Attorney General of the State of Mississippi; W. B. KENNA, W. H. McKENZIE, [illegible], JOMER B. CHISHOLM, M. L. [illegible] and [illegible] BARRETT, as members of the Board of Education of Holmes County; MRS. HATTIE MAHEL FARMER, ED WILLIAM MOSES and MRS. [illegible] STARLAND, as County Election Commissioners for Holmes County,

Appellees.

SETH BALLARD and CHARLES EVERS, on behalf of themselves and all other persons similarly situated,

Appellants,

-vs-

JOE T. PATTERSON, Attorney General of the State of Mississippi; ROBERT LEE WILLIAMS, I. D. STEWART, EMILE GUEDON, TRULY CUPIT and ANON KILLINGSWORTH, as members of the Board of Education of Jefferson County; SAM BULLEN, JOHN JEWELL BALL and RANDOLPH CUPIT, as County Election Commissioners for Jefferson County,

Appellees.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the United States District Court for the Southern District of Mississippi are not yet reported. The text of said opinions is contained in Appendix A hereto.

JURISDICTION

(1) These proceedings seek declaratory judgments that Section 6271-08 of the Mississippi Code, as amended, comes within

the purview of the Voting Rights Act of 1965 (42 U.S.C. Section 1973) and 42 U.S.C. Section 1971; permanent injunctions against the application and enforcement of said Section 6271-08 by certain county Boards of Education; and permanent injunctions against the appointment of the Superindendent of Education by said county Boards of Education until such time as the Voting Rights Act of 1965 has been complied with, or the procedure followed for opting to make said post appointive as set forth in Section 6271-08 prior to its amendment in 1966.

Jurisdiction was conferred on the court below by 28 U.S.C. Sections 1343(3) and (4), and 2201 and 2202, and by 42 U.S.C. Sections 1971(d) and 1973(j) and (f). A district court of three-judges was required

to be convened by 28 U.S.C. Section 2281 and 42 U.S.C. Section 1973c.

(2) The judgment herein sought to be reviewed was entered in each of the consolidated cases on October 5, 1967, and the Notice of Appeal in each case was filed on November 28, 1967, with the United States District Court for the Southern District of Mississippi.

(3) The Supreme Court has jurisdiction of this direct appeal pursuant to 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

(4) There are no cases specifically dealing with appeal pursuant to 28 U.S.C. Section 1253 or 42 U.S.C. Section 1973c from a three judge court decision pursuant to the Voting Rights Act of 1965 (42 U.S.C. Section 1973). This appeal fits so closely

within the terms of the cited statutes, however, as to need no precedents to sustain jurisdiction. The last sentence of Section 5 of the Voting Rights Act of 1965 (hereinafter "Section 5") provides that "any action under this section shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court."

(5) Section 6271-08 of the Mississippi Code of 1942, prior to its amendment in 1966, may be found in volume 5 of the 1964 Cumulative Supplement to the Mississippi Code, at pages 392-93. The 1966 amendment to Section 6271-08 may be found in Volume 5 of the 1966 Cumulative Supplement to the Mississippi Code at pages 436-438.

QUESTIONS PRESENTED

(1) Whether the District Court erred:

(a) In finding that Section 6271-08 of the Mississippi Code, as amended by the 1966 session of the Mississippi Legislature does not come within the purview of and is not covered by Section 5 of the Voting Rights Act of 1965 (42 U.S.C. Section 1973c) so as to require compliance with said Section 5 by the State of Mississippi and the counties involved in each of the cases herein on appeal, prior to enforcing or applying Section 6271-08 as amended; and

(b) In dismissing each of the complaints, thereby denying the relief requested therein.

(2) Whether the November 7, 1967, election in each of the counties herein involved having been held in accordance with Section 6271-08, as amended (i.e., no election for County Superintendent having been held), this Court, if it finds that Section 5 of the Voting Rights Act of 1965 should have been complied with as aforesaid, should order an election of such County Superintendent of Education pursuant to the provisions of Section 6271-08 prior to its amendment in 1966.

STATEMENT OF THE CASE

These cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 6271-08 of the Mississippi Code. Prior to June 17, 1966, every county in Mississippi except one elected its Superintendent of Education

unless it held a special election pursuant to Section 6271-08 to make such post appointive. Jefferson, Claiborne and Holmes Counties, the counties herein, have always elected their Superintendent of Education.

Effective June 17, 1966, the Legislature of Mississippi amended the aforesaid Section 6271-08 to provide that in twelve described counties, including Jefferson, Claiborne and Holmes Counties, the Superintendent of Education must be appointed rather than elected.

The Voting Rights Act of 1965 (42 U.S.C. Section 1973) applies to Mississippi and provides in Section 5 that whenever a State or political subdivision thereof:

> "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1,

1964," (42 U.S.C. Section 1973c) such State or political subdivision cannot enforce or apply such change until it has either (1) instituted an action in the United States District Court for the District of Columbia for a declaratory judgment that

> "such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. Section 1973c)

and such judgment has been entered, or (2) submitted the change to the Attorney General of the United States and had no objection interposed by the Attorney General within 60 days after such submission.

Neither the State of Mississippi, nor any of its officials, nor Jefferson, Claiborne or Holmes Counties, nor any of

their officials has instituted any action in the United States District Court for the District of Columbia with respect to Section 6271-08 of the Mississippi Code, as amended, nor submitted such amended Section to the Attorney General of the United States.

Plaintiffs in each of the three suits herein seek to have the amendment to Section 6271-08 of the Mississippi Code declared such a change in qualification, prerequisite, standard, practice or procedure, within the purview of Section 5 of the Voting Rights Act of 1965, as to require defendants to comply with Section 5. The District Court in each of the cases held that the amendment did not come within the purview of and is not covered by the Voting Rights Act of 1965, and dismissed

the complaints herein.

SUBSTANTIALITY OF QUESTIONS

The Voting Rights Act of 1965 (42 U.S.C. Section 1973) was designed to prevent states and political subdivisions with a history of avoiding the mandate of the Fifteenth Amendment to the Constitution of the United States from so doing, and to prevent such practices prior to their becoming effective.

The constitutionality of Section 5 has been upheld in South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966):

> "Congress knew that some of the States covered by Section 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees (footnote omitted). Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for

> voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner (by enacting Section 5)."

Section 5 is triggered when, by its own provisions, there is any change in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . ." It is a fundamental precept of statutory construction that the words of a statute are to be given their ordinary meaning. The quoted words could hardly be broader in scope. This breadth of meaning is reinforced by the definition of "voting" provided by Section 14(c)(1) of the Voting Rights Act of 1965 (42 U.S.C. Section 1973 l(c)(1)) as including "all action necessary to make a vote effective in any primary,

special or general election . . ." (Emphasis added.) A broad, rather than a narrow interpretation, is given further support by the fact that Section 5 is meant to prevent not only denial by a state of the right to vote, but also abridgment of the right to vote.

The legislative history of Section 5 similarly shows that Section 5 was intended to cover a wide range of state provisions. The Attorney-General of the United States testified that "two or three" types of state law could be written out of the section, but "there are precious few, because there are an awful lot of things that could be started for the purposes of evading the Fifteenth Amendment if there is a desire to do so." (Mr. Katzenbach, House Hearings, p. 95) Earlier in the hearing he gave ex-

amples of changes which would not be covered--changes in voting age, residence requirements, and balloting procedures such as changing from paper ballots to machines (he expressed some reservations if the change was from machines to paper). (Mr. Katzenbach, House Hearings, pp. 61-62) In the Senate hearings, the Attorney-General accepted a change by Senator Fong to include in the section the language "standards" and "practices". (Senate Hearings, p. 192) The Senator thought the change would broaden the section to make it all-inclusive. The Attorney-General thought the section all-inclusive even without the change. (Senate Hearings, pp. 191-92)

The overall purpose of the Voting Rights Act and the specific purpose of Section 5 was to eliminate and prohibit

amples of changes which would not be covered--changes in voting age, residence requirements, and balloting procedures such as changing from paper ballots to machines (he expressed some reservations if the change was from machines to paper). (Mr. Katzenbach, House Hearings, pp. 61-62). In the Senate hearings, the Attorney-General accepted a change by Senator Long to include in the section the language "standards" and "practices". (Senate Hearings, pp. 192). The Senator thought the change would broaden the section to make it all-inclusive. The Attorney-General thought the section all-inclusive even without the change. (Senate Hearings, pp. 101-02).

The overall purpose of the Voting Rights Act and the specific purpose of section 5 was to eliminate and prohibit

practices and procedures which would perpetuate the effects of discrimination in the election process. In Section 5 Congress sought to prevent state legislatures from raising new barriers of discrimination. Past experience had defined the need for such a remedy.

> "Mr. Katzenbach: The justification is simply this: Our experience in the areas that would be covered by this Bill has been such as to indicate frequently on the part of state legislatures a desire in a sense to outguess the Congress of the United States. I refer, for example to the new voter qualifications that have been put into statutes of Louisiana, Mississippi, and Alabama following the enactment of the 1964 Act which made things more difficult for people to vote . . . .
>
> "The same thing was true, as the Chairman may recall, in Louisiana at the time of the initial school desegregation, where the legislature passed I don't know how many laws in the shortest period of time. Every time the judge issued a decree, the legislature. . . passed a law to

frustrate the decree." (House Hearings, 60.)

In the time it would take for the Government to learn about such newly adopted procedures (Mr. Marshall, House Hearings, p. 72) and litigate their validity, the new statutes would have done their damage (Mr. Katzenbach, Senate Hearings, p. 237). Thus the remedy of Section 5 was, basically, to require federal scrutiny of such statutes in the area of voting before they could be put into effect.

To those familiar with the past history of discriminatory voting legislation in Mississippi, the need for such protection as Section 5 provides is readily apparent. (See, e.g., United States v. Mississippi, 380 U.S. 128, 135-136 (1965)):

"It is apparent that the complaint . . . charged a long standing, care-

> fully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the registration statistics . . . would seem to show had been remarkably successful."

Congress and the courts have consistently noted the pattern of discrimination in Mississippi and the purpose behind its voting legislation. The Supreme Court in commenting on the Voting Rights Act of 1965 in South Carolina v. Katzenbach, supra, said:

> "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." Id. at 308.

and again,

> "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." Id. at 309.

and,

> "(S)ome of the States affected have

> merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration (specifically referring in n. 19 at this point to the Mississippi Legislature)." Id. at 314.

Having proved the overwhelming history of past problems of discrimination and legislative purpose, it is hornbook law that a presumption arises that facts or conditions once proven are deemed to continue to exist unless proven otherwise. Allstate Finance Corp. v. Zimmerman, 330 F.2d 740 (5th Cir. 1964); NLRB v. Piqua Munising Wood Prods. Co., 109 F.2d 552 (6th Cir. 1940); 2 Wigmore, Evidence, Section 437 (3d ed. 1940).

This doctrine has been specifically adopted in discrimination cases as in Cassell v. Texas, 339 U.S. 282, 293 (1950),

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Having proved the overwhelming history of past problems of discrimination and legislative purpose, it is hornbook law that a presumption arises that facts or conditions once proven are deemed to continue to exist unless proven otherwise. Allstate Finance Corp. v. Zimmerman, 330 F.2d 740 (5th Cir. 1964); NLRB v. Pique Munising Wood Prods. Co., 10[illegible] F.2d 552 (6th Cir. 1940); 2 Wigmore, Evidence, Section 437 (3d ed. 1940).

This doctrine has been specifically adopted in discrimination cases as in Cassell v. Texas, 339 U.S. 282, 293 (1950),

where Mr. Justice Reed stated:

> "If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose."

Thus, in Sellers v. Trussell, 253 F. Supp. 915 (M.D. Ala. 1966), the only case to consider Section 5 to date, in concluding that an Alabama election statute had a purpose of racial discrimination, Judge Johnson gave practical effect to the foregoing presumption when he discussed the history of voting discrimination against Negroes in Alabama and reasoned that:

> "Any determination in this case of legislative motive must be viewed in this light. Viewing Act 536 in such light, leads me . . . to the firm conclusion that its introduction and passage was racially motivated." 253 F. Supp. at 919.

Taking away from the qualified

where Mr. Justice Reed stated:

"If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose."

Thus, in Sellers v. Trussell, 253 F. Supp. 915 (U.S. Ala. 1966), the only case to consider Section 5 to date; in concluding that an Alabama election statute had a purpose of racial discrimination, Judge Johnson gave practical effect to the foregoing presumption when he discussed the history of voting discrimination against Negroes in Alabama and reasoned that:

"Any determination in this case of legislative motive must be viewed in this light. Viewing Act 536 in such light, leads me . . . to the firm conclusion that its introduction and passage was racially motivated." 253 F. Supp. at 919.

Taking away from the qualified

electors of certain counties in the state their right to vote for what has always been an elective office is a change in standard, practice or procedure with respect to voting, and is well within the puryiew of Section 5. This is not merely an "abridgment" of the right to vote as was found in Sellers v. Trussell, supra, to be within the contemplation of Section 5, but is an absolute denial of the right to vote with respect to the County Superintendent of Education.

In Sellers Judge Rives concluded that a statute extending the terms of county commissioners in Bullock County, Alabama, from 4 to 6 years was covered by Section 5 and, because Alabama had failed to comply with the requirements of Section 5, was in violation thereof. (Judge

[illegible] of certain counties in the state [illegible] right to vote for what has always been an elective office is a change in [illegible] procedure with re- [illegible] voting, and is well within the [illegible] of Section 5. This is not merely [illegible] of the right to vote as was [illegible] Russell, supra, to be [illegible] the consolidation of Section 5, but [illegible] of the right to vote [illegible] the County Superintendent [illegible].

In Bullock Judge Rives concluded [illegible] statute extending the terms of [illegible] commissioners in Bullock County, [illegible] from 4 to 6 years was covered by Section 5 and, because Alabama had failed to comply with the requirements of Section 5, was in violation thereof. (Judge

Johnson found it unnecessary to reach that question, and Judge Grooms dissented.)

Suspension of the right to vote for two years is much less of a change than the abolition of one's right to vote for a particular office indefinitely. If the amendment in question herein is not held to be within the language of the Voting Rights Act of 1965, then the Act will be a dead-letter law in that it will provide no remedy against discrimination and abuse of the elective processes except in the most simple and obvious case.

It takes no great imagination to conceive of the potential for racial discrimination which underlies the amendment to Section 6271-08 of the Mississippi Code, making the formerly elective post of County Superintendent of Education mandatorily appointive

Johnson found it unnecessary to reach that question, and Judge Grooms dissented.) Suspension of the right to vote for two years is much less of a change than the abolition of one's right to vote for a particular office indefinitely. If the amendment in question herein is not held to be within the language of the Voting Rights Act of 1965, then the Act will be a dead-letter law in that it will provide no remedy against discrimination and abuse of the elective processes except in the most simple and obvious case.

It takes no great imagination to conceive of the potential for racial discrimination which underlies the amendment to Section 6771-08 of the Mississippi Code, making the formerly elective post of County Superintendent of Education mandatorily appointive

in 12 of Mississippi's 82 counties.

After the invalidation of the poll tax requirements to voting, and after federal registrars were sent to Mississippi, large numbers of previously unregistered Negroes were able to register to vote. A number of counties in the state now have, or are close to having Negro voting majorities. The County Superintendent of Education is elected on a county-wide basis.

Of the 12 counties elusively described in the amendment herein in question, and which are henceforth required to appoint a Superintendent of Education, ten of the twelve have, or could have, Negro voting majorities. See Appendix C for a breakdown of the counties and population according to the 1960 Federal Decennial Census.

What conceivable legitimate purpose

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Of the 12 counties clusively described in the amendment herein in question, and which are henceforth required to appoint a Superintendent of Education, ten of the twelve have, or could have, Negro voting majorities. See Appendix C for a breakdown of the counties and population according to the 1960 Federal Decennial Census.

What conceivable legitimate purpose

was served in 1966 by singling out twelve counties and legislating away their option to elect or appoint a County Superintendent of Education -- forcing them to appoint rather than elect as they had in the past? This is particularly significant in view of the importance of the office of County Superintendent of Education; as, for example, in integrating and upgrading schools.

It is no answer to say to the Negroes of the county whose Superintendent of Education must now be appointed that he is to be appointed by an elective County Board of Education. The Board of Education in each of these counties is elected by districts, and it does not follow that a county having a county-wide Negro voting majority has a Negro voting majority in each of its districts, or even in a majority of its dis-

tricts.

It is to be kept in mind that the appellants are not asking that the amendment itself be declared unconstitutional. They are merely asking that the state or counties involved comply with the Voting Rights Act of 1965, under which either the Attorney-General of the United States or the District Court for the District of Columbia may make a determination as to the discriminatory purpose and effect of the amendment prior to its becoming effective. The amendment in question is exactly the kind of change which the Voting Rights Act contemplated should be reviewed in order to prevent devious dilution and withdrawal of the right to vote on account of race or color.

It is no accident that Section 5

places the burden of proof of nondiscriminatory purpose and effect upon the covered State. From the foregoing discussion, one can reasonably conclude that Section 6271-08 might well in fact be used to discriminate against the Negro, for racial discrimination in a State such as Mississippi has been so pervasive and has so infected the processes of Government, especially in the area of voting rights. See, e.g., United States v. Mississippi, 359 F.2d 103 (5th Cir. 1966); United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965); United States v. Lynd, 349 F.2d 785 (5th Cir. 1965); United States v. Ward, 345 F.2d 857 (5th Cir. 1965). Therefore, it is fitting that the State of Mississippi assume the burden of demonstrating that Section 6271-08 "does not have the purpose and will not have the

effect of denying or abridging the right to vote on account of race or color."

The scope of the language "voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting" has never been construed by an appeal court. An authoritative construction of the above language is essential to the viability of the Voting Rights Act and protection of the right to vote and the strength of the vote.

Respectfully submitted,

January 24, 1968.

DENISON RAY
LAWRENCE ASCHENBRENNER
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississppi

Counsel for Appellants.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CHARLES E. BUNTON, ET AL PLAINTIFFS

VS. CIVIL ACTION NO. 1204W

JOE T. PATTERSON, ET AL DEFENDANTS

O R D E R

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether or not Section 6271-08 of the Mississippi Code of 1942, as amended by the legislature at the regular session of

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CHARLES H. BURTON, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. 3:92cv

DEFENDANTS

O R D E R

This cause coming on for hearing on the Complaint, the Answer and Agreement of counsel, as stipulated in open court. The Court finds that this matter should be considered as a Three-Judge Court Hearing, and all parties having waived same, that no factual issues are to be offered, the sole question for determination being whether or not Section 5271-05 of the Mississippi Code of 1942, as amended by the Legislature at the Regular Session of

1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 6271-08 as amended by the legislature of Mississippi at its regular session of 1966 does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C., and that plaintiffs are entitled to no relief in this acion.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in this action be, and the same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE
Acting For and on Behalf of
The Court

A TRUE COPY, I HEREBY CERTIFY,
ROBERT C. THOMAS, CLERK
BY:
/s/ Ruby L. Short
Deputy Clerk
Dated: 10/8/67

- - - - - - - - - - -

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

VERNON TOM GRIFFIN, ET AL PLAINTIFFS

VS. CIVIL ACTION NO. 4148J

JOE T. PATTERSON, ET AL DEFENDANTS

O R D E R

This cause came on for hearing on the Complaint, and Answer and argument of counsel, it being stipulated in open court that this hearing would be considered as a final hearing on the merits, and all parties hav-

/s/ HAROLD COX

UNITED STATES DISTRICT JUDGE

Acting for and on Behalf of

The Court

ing announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether or not Section 6271-08 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973 (c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 6271-08 as amended by the legislature of Mississippi at its regular session of 1966 does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C., and that plaintiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND AD-

JUDGED that the injunction prayed for in this action be, and the same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE
Acting For and on Behalf of
The Court

- - - - - - - - - -

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

SETH BALLARD, ET AL PLAINTIFFS

VS. CIVIL ACTION NO. 1200W

JOE T. PATTERSON, ET AL DEFENDANTS

O R D E R

This cause came on for hearing on the Complaint, the Answer and argument of counsel, it being stipulated in open court that

this hearing would be considered as a final hearing on the merits, and all parties having announced that no factual issues are involved and no testimony or evidence was to be offered, the sole question for determination being whether or not Section 6271-08 of the Mississippi Code of 1942, as amended by the legislature at the regular session of 1966, comes within the purview of or is covered by Section 5 of the Voting Rights Act of 1965, being now Section 1973(c) of Title 42, U.S.C.

It is the opinion of the Court that said Section 6271-08 as amended by the legislature of Mississippi at its regular session of 1966 does not come within the purview of and is not covered by Title 42, Section 1973(c) U.S.C., and that plain-

tiffs are entitled to no relief in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the injunction prayed for in this action be, and the same is, hereby, denied and the Complaint is dismissed at the cost of plaintiffs.

ORDERED AND ADJUDGED, this the 5th day of October, 1967.

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE
Acting For and on Behalf of
The Court

A TRUE COPY, I HEREBY CERTIFY.
ROBERT C. THOMAS, CLERK
BY:
/s/ Ruby L. Short
Deputy Clerk

Dated: 10/8/67

* * * * * * * * * *

APPENDIX B

Section 6271-08, as herein relevant, before amendment read:

> "(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior

to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office

shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided."

Following its amendment in 1966, Section 6271-08, as herein relevant, reads:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of

the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class Three county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county, the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication

shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and

no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U. S. Highways 49 and 51, and State Highways 16, 17 and 43 and the Natchez Trace; in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U. S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect;[1] in any county created after 1916 through which the Yazoo River flows; in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on

the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a land-grant institution or lands contiguous thereto owned by the institution;[2] in any county lying within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960; in any county having a population of twenty-six thousand seven hundred fifty-nine (26,759) according to the 1960 Federal census, and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect; in any Class Three county wherein is partially located a national forest and wherein U.S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00; the county superintendent of education hereafter shall be appointed by the county board of education.

"In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972."

1. Underlined portion is description fitting Holmes County.

2. Underlined portion is description fitting Jefferson and Claiborne Counties.

APPENDIX C

Statutory Language	County	Population
"Any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census;"	Washington	35,239 White 43,097 Negro 302 Other
"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole and in part by U.S. Highways 49 and 51 and State Highways 16, 17 and 43 and the Natchez Trace;"	Madison	9,267 White 23,630 Negro 7 Other
"in any Class Four county having a population in excess of twenty-five thousand (25,000)	Holmes	7,595 White 19,488 Negro 13 Other

Statutory Language	County	Population
according to the 1960 Federal census, traversed by U.S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect;"		
"in any county created after 1916 through which the Yazoo River flows;"	Humphreys	5,758 White 13,300 Negro 35 Other
"in any Class Four county having a land area of six hundred ninety-five (695) square miles; bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U.S. Highway 45 and Mississippi Highway 14 intersect;"	Noxubee	4,724 White 12,064 Negro 38 Other
"in any county bordering on the Mississippi River wherein lies the	Claiborne and Jefferson	Claiborne 2,600 White 8,239 Negro 6 Other

Statutory Language	County	Population
campus of a land grant institution or lands contiguous thereto owned by the institution;"	Jefferson	2,489 White 7,652 Negro 1 Other
"in any county lying within the Yazoo Mississippi Delta Levee district, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960;"	Coahoma	14,630 White 31,440 Negro 142 Other
"in any county having a population of twenty-six thousand, seven hundred fifty-nine (26,759) according to the 1960 Federal census and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect;"	Lincoln	18,407 White 8,340 Negro 12 Other

Statutory Language	County	Population
"in any Class Three county wherein is partially located a national forest and wherein U.S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00;"	Copiah	12,992 White 14,057 Negro 1 Other
"in any county bordering on the Gulf of Mexico or Mississippi Sound having therein a test facility operated by the "National Aeronautics and Space Administration," the superintendent shall be appointed beginning January 1, 1972."	Hancock	11,784 White 2,246 Negro 9 Other

CERTIFICATE OF SERVICE

I, hereby certify that I have this day mailed via United States mail, postage prepaid, a copy of the foregoing Jurisdictional Statement of Appellants to:

Attorney General Joe T. Patterson
New Capitol Building
Jackson, Mississippi

J. T. Drake, Esq.
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Robert L. Corban, Esq.
Fayette, Mississippi

Calvin R. King, Esq.
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January , 1968.

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Jackson, Mississippi
39201

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CLIFTON WHITLEY, ET AL., *Appellants*,

v.

JOHN BELL WILLIAMS, Governor of the State of Mississippi, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Mississippi (Three Judge Court)

JURISDICTIONAL STATEMENT

ARMAND DERFNER
ALVIN J. BRONSTEIN
JAMES A. LEWIS
603 North Farish Street
Jackson, Mississippi 39202

Of Counsel:

RICHARD B. SOBOL
606 Common Street
New Orleans, Louisiana

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

CLIFTON WHITLEY, ET AL., *Appellants,*

v.

JOHN BELL WILLIAMS, Governor of the State of Mississippi, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of Mississippi (Three Judge Court)

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi is not yet reported. It is reprinted in Appendix A. An earlier opinion in this case is reported *sub nom. Whitley v. Johnson,* 260 F. Supp. 630 (S.D. Miss. 1966).

JURISDICTION

This is a suit to enforce the provisions of section 5 of the Voting Rights Act against the use by Mississippi of a voting practice or procedure different from that in effect on November 1, 1964.

The judgment from which the appeal is taken was entered by the United States District Court for the Southern District of Mississippi on October 31, 1967, and the Notice of Appeal was filed in that court on October 31, 1967.

The jurisdiction of the court below to hear the case was based on 28 U.S.C. §§ 1343(3), 1343(4), 2201, and 2202, and 42 U.S.C. §§ 1971(d), 1973c, and 1973j(f). A three-judge court was required by 28 U.S.C. § 1973c and in addition by 28 U.S.C. § 2281, since the suit sought to enjoin enforcement of a state statute in violation of the Supremacy Clause, Art. VI, of the Constitution of the United States. *Kesler* v. *Department of Public Safety,* 369 U.S. 153 (1962).

The jurisdiction of the Supreme Court to hear a direct appeal in this case comes from the explicit terms of the statute under which this case arose, 42 U.S.C. § 1973c, and from 28 U.S.C. § 1253, which permits direct appeals from judgments in cases required by Act of Congress to be heard by three-judge district courts.

STATUTES INVOLVED

The statutes involved in the case are:

(1) section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [1973b(a)] are in effect shall enact or

seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

(2) section 3260 of the Mississippi Code of 1942, as amended in 1966 by House Bill No. 68. This is the statute which appellants submit is barred by section 5 of the Voting Rights Act; its text is set forth in Appendix B, in both its prior and present versions.

QUESTIONS PRESENTED

1. Whether a state statute which makes it more difficult for voters to choose independent candidates by (a) providing that one who votes in a party primary may not be an independent candidate for public office, (b) increasing ten-fold the number of voters who must sign an independent candidate's petition and requiring that each voter personally sign his name and list his precinct, and (c) making the qualification date for candidates substantially earlier, is a statute dealing with "a voting qualification or prerequisite for voting, or standard, practice or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act of 1965.

2. Whether such a statute violates section 5 of the Voting Rights Act, which provides that no statute within the Act can be enforced in the absence of a declaratory judgment that the statute is free of racial discrimination or a sixty-day acquiescence by the Attorney General, neither of which occurred here.

3. Whether, if the answer to the first two questions is "yes", those 1967 Mississippi elections in which voters were deprived of the right to vote for candidates who failed to qualify solely because of the enforcement of the new tests can be allowed to stand.

STATEMENT OF THE CASE

Mississippi is subject to the Voting Rights Act of 1965, 42 U.S.C. § 1973.[1] Under section 5 of that Act, 42 U.S.C. § 1973c, if it seeks to enforce "any voting qualification or prerequisite to voting, or standard,

[1] This and several other matters have been stipulated; the terms of the stipulation are attached to the opinion of the court below, reprinted herein as Appendix A.

practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it must obtain a declaratory judgment that the new procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The State may also enforce the procedure if it is submitted to the Attorney General of the United States and he fails to object within sixty days.

In 1966, the Mississippi Legislature amended section 3260 of the Mississippi Code of 1942—which provides how a candidate for state office gets a place on the ballot—to make it more difficult for independent candidates to qualify for election by the voters:

(1) No person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election;

(2) the numbers of signatures of qualified electors needed on the petition of an independent candidate is substantially increased, in most cases ten-fold;

(3) each qualified elector must personally sign the petition for an independent candidate and must include his polling precinct and county;

(4) the time for filing a petition as an independent candidate is now substantially earlier than it was previously.

It has been stipulated that the State of Mississippi neither obtained the declaratory judgment required by section 5 of the Voting Rights Act nor submitted the new test to the Attorney General before putting it into effect. See Appendix A.

Appellants were prospective independent candidates for state office in 1966 who were kept off the ballot, although they satisfied the pre-1966 provisions of section 3260, because they did not have the number of signatures required by the 1966 amendment to section 3260.[2] On October 20, 1966, appellants filed a class action on behalf of themselves and all others similarly situated, requesting an injunction against enforcement of the new procedures of section 3260 on the ground that section 5 of the Voting Rights Act barred such enforcement and that the new procedures violated the Fourteenth and Fifteenth Amendments. A three-judge district court exercised its equity jurisdiction and ordered appellants placed upon the ballot for the 1966 election, but without reaching any of the constitutional or statutory issues presented by the suit. *Whitley* v. *Johnson,* 260 F. Supp. 630 (S.D. Miss. 1966).

In 1967, the Secretary of the State of Mississippi applied the procedures of new section 3260 to bar other members of the class represented by appellants. The appellants' memorandum of law submitted in the court below lists fifteen examples of candidates kept off the ballot.[3] These examples show that each of the procedures of the new section 3260 described above had the effect of keeping at least one candidate off the ballot in the Mississippi general elections of 1967.[3]

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[2] And in two cases on the additional ground that the petitioner had *run* in the primary, even though the new § 3260 refers only to those who have *voted* in the primary.

[3] 1. Mrs. Fannie Lou Hamer, Sunflower, State Senate, voted in primary.
2. Philip McKinney, DeSoto, Supervisor Beat 4, filed too late.
3. Dan Lofton Mason, Hinds, Supervisor Beat 2, voted in Democratic Primary.
4. L. C. Leach, Hinds, J. P. Beat 2, Post 1, voted in Democratic Primary.

As a result appellants moved for a permanent injunction against enforcement of the new procedures of section 3260, and in order to obtain relief in time for the 1967 elections, agreed to stipulate that the only issue before the court was whether the Voting Rights Act barred enforcement of section 3260. As so stipulated the court below took briefs and denied the injunction on the ground that the new section 3260 did not impose "a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act:

> "The Mississippi statute under consideration (House Bill 68) is directed solely to the qualifications of candidates, whereas Section 5 has reference to the qualifications of voters. We do not believe that the Mississippi statute is of the kind

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5. Rev. J. L. Brown, Hinds, Supervisor, Beat 3, voted in Democratic Primary.
6. Johnnie Ross, Hinds, J. P. Beat 3, voted in Democratic Primary.
7. John Daniel Wesley, Holmes, J. P. Beat 5, voted in Democratic Primary.
8. George Raymond, Madison, State Rep. Post 1, insufficient signatures on petition—no precincts.
9. Bennie L. Thompson, Madison, Supervisor Beat 3, insufficient signatures on petition—no precincts.
10. Ellis Saddler, Madison, J. P. Beat 3, Post 1, insufficient signatures on petition—no precincts.
11. Floyd Moore, Madison, J. P. Beat 3, Post 2, insufficient signatures on petition—no precincts.
12. H. L. Gray, Sr., Madison, Constable Beat 3, Post 1, insufficient signatures on petition—no precincts.
13. Hubert McDonald, Madison, Constable Beat 3, Post 2, insufficient signatures on petition—no precincts.
14. Rev. L. D. Coleman, Quitman, Supervisor Beat 3, filed too late.
15. Rev. Sammy Rash, Bolivar, State Rep. Post 2, no post listed on petition.

which Section 5 of the Voting Rights Act of 1965 was designed to prevent. The Mississippi statute under attack does not appear on its face to be one designed or intended to effect a discrimination or qualification relating to the person or voting rights of the individual. The Act does not deal with voting but deals with elections, and more particularly the candidates; therefore, it does not impinge upon Section 5 of the Voting Rights Act of 1965."

A motion presented to Mr. Justice Black for an injunction pending appeal in this Court was denied, and the 1967 general elections were held without the people of the State of Mississippi being permitted to vote for a large number of candidates who qualified under the tests of old section 3260 but not under those of the 1966 amendment. This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

Those states, including Mississippi, which have traditionally deprived Negroes of the right to vote have displayed great ingenuity in raising new barriers of discrimination to circumvent successive checks imposed by Congress and the courts.[4] In passing the Voting

[4] "The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, and Myers v. Anderson, 238 U.S. 368. Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268. The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, and Terry v. Adams, 345 U.S. 461. Improper challenges were nullified in United States v. Thomas, 362 U.S. 58. Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339. Finally, discriminatory application of voting tests was condemned in Schnell v. Davis, 336 U.S. 933; Alabama v. United States, 371 U.S. 37; and Louisiana v. United States, 380 U.S. 145." South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966).

Rights Act of 1965, therefore, Congress not only barred these states from using "any test or device" as a prerequisite for voting, but also prohibited them from making any changes in their voting and election laws without first satisfying federal authorities that the changes would not have the purpose or effect of discriminating against Negroes.

Since the passage of the Voting Rights Act, the State of Mississippi alone has passed at least 18 voting or election laws which are arguably subject to the Act's requirement of advance clearance.[5] In not a single case has the State sought to discharge its burden of proving that the new voting practice or procedure is free of racial discrimination. The need for a determination of what types of statutes are covered by section 5 is clear.[6]

The Mississippi statute involved in this case, House Bill No. 68, limited voters' opportunities to vote for independent candidates by making it more difficult for such candidates (who would generally be Negroes) to get on the ballot, and did so in part by provisions which limited the class of voters eligible to vote in party primaries and which required that signers of independent candidates' petitions sign personally.

The court below held that this statute was not subject to section 5 of the Voting Rights Act because it "does not deal with voting but deals with elections."

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[5] See Appendix C.

[6] Two other cases seeking to enjoin enforcement of Mississippi statutes on the ground that they violate section 5 of the Voting Rights Act are now on appeal in this Court. *Fairley* v. *Patterson*, No. 1058, October Term 1967; *Bunton* v. *Patterson*, No. 1059, October Term 1967.

Appellants submit that the Voting Rights Act does not permit such a distinction and that it is precisely statutes like House Bill No. 68 which Congress intended to subject to federal scrutiny for discriminatory purpose or effect.

The right to vote protected by the Act is not merely an abstract right to cast a ballot, but includes all steps necessary to make one's vote effective. The all-inclusive coverage of the Act is confirmed not only by the legislative history, *see* Senate Hearings 191-92, but by the definition of voting found in section 14(c)(1):

> "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . casting a ballot, and having such ballot counted. . . ." 42 U.S.C. § 1973*l*.

Moreover, since the Voting Rights Act was an exercise of Congress' power (under the second clause of the Fifteenth Amendment) to enforce the voting guarantee of that Amendment, the Act's coverage is as broad as that of the Fifteenth Amendment itself. And this Court's Fifteenth Amendment cases make it clear that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939).

Thus, the right to vote has been held to include choosing candidates in party primaries[7] or in pri-

[7] *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932).

maries of private political clubs,[8] whether these primaries were administered by the State or not,[9] as well as redistricting to deny Negroes the vote in a particular municipality [10] and extending terms of incumbent officials to curtail voting opportunities.[11] The right to vote comprises all these steps because each is an "integral part of the procedure of choice" of representatives. *United States* v. *Classic*, 313 U.S. 299, 318 (1943).

In *Classic* this Court went on to say that the primary "involves a necessary step in the choice of candidates for election as representatives." 313 U.S. at 320. Choosing independent candidates, the subject of the Mississippi statute involved here, is in effect the independent voter's primary, and this Court should be slow to hold that the Voting Rights Act was not intended to protect Negro voters against a discriminatory scheme which is simply the counterpart of those which came before this Court so frequently a generation ago. Years of white domination of party primaries convinced many Negroes that their votes could not be effectively cast in such primaries, but only on behalf of independent candidates. The State of Mississippi has responded by raising the already discriminatory bar-

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[8] *Terry* v. *Adams*, 345 U.S. 461 (1953); *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir. 1947); *Baskin* v. *Brown*, 174 F.2d 391 (4th Cir. 1949).

[9] *Smith* v. *Allwright*, 321 U.S. 649 (1944). See *United States* v. *Classic*, 313 U.S. 299 (1943).

[10] *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[11] *Sellers* v. *Trussell*, 253 F.Supp. 915 (M.D.Ala. 1966).

riers to voting for independent candidates.[12] While this route to effective voting is not completely cut off by new section 3260, the statute does deal with voting and that alone, even without the strong suggestion here of a purpose to abridge Negroes' voting rights, is enough, under section 5, to require the state to submit the statute to federal scrutiny before enforcing it.

The only case dealing with the coverage of section 5, *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966), supports appellants' arguments here. There the Alabama legislature had extended for two years the terms of office of officials who had been elected at a time when Negroes were being illegally deprived of the right to vote. According to Judge Rives, the statute both violated the Fifteenth Amendment and came within section 5 since "to freeze elected officials into office is, in effect, to freeze Negroes out of the electorate."[13] If depriving Negroes of opportunities to

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[12] In contrast to the requirements for independent candidates a party holding a primary automatically gets its candidates on the ballot, no matter how many votes were cast in the primary.

The onerousness of the signature requirements of new section 3260 was recognized by the legislature itself in connection with the 1968 special election to fill the Congressional seat vacated by now-Governor John Bell Williams. Heretofore, special elections were governed by section 3260, so that all candidates—not just Negroes or independents—would be subject to its signature requirements. Whereupon the legislature, having in new section 3260 increased the number of signatures required for an independent candidate to 2000, now deemed it expedient to make an exception for *special elections* and lowered the number of signatures required to 1000. House Bill No. 19, amending section 3304 (Jan. 15, 1968).

[13] 253 F.Supp. at 917. Judge Johnson would not have reached the question of the applicability of section 5 of the Voting Rights Act, but concurred in holding that the Alabama statute violated the Fifteenth Amendment. Since the language of both the Fifteenth

vote, and more particularly to vote for candidates of their choice, by making elections less frequent comes within section 5, it should follow that depriving Negroes of opportunities to vote for candidates of their choice by making it difficult for these candidates—likely to be Negroes—to be on the ballot likewise comes within section 5.

As to two of the provisions of the new law, the coverage of section 5 is even clearer. One change bars prospective independent candidates from *voting* in a party primary. (Nothing prevents a prospective independent from *running* in a party primary.) That such a provision deals with voting is shown by *Bowen* v. *Williams,* 238 Miss. 57, 117 So. 2d 710 (1960). There a provision limiting voting in a primary to those who would pledge adherence to its outcome was held not to bar a loser in the primary from running in the general election, because the statute was held to deal with voting in the primary rather than with candidacy.

A second change requires that each petitioner on behalf of an independent candidate personally sign the petition. Signing a petition to get a candidate on the ballot is the exact counterpart of voting for a candidate in a primary. Furthermore, this provision is open to the construction that handwritten signatures are required even from illiterates and, as such, clearly violates section 4 of the Voting Rights Act. 42 U.S.C. 1973b.

It need not be shown that the new provision discriminates in order to enjoin its enforcement; all that

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Amendment and the Voting Rights Act is in terms of denying or abridging the right to vote, as discussed above, the two holdings seem to amount to the same thing. Judge Grooms dissented from both holdings.

need be shown is that it deals with voting. Since at that point the federal authorities have jurisdiction, the question of what provisions do deal with voting should also be submitted to those authorities, at least in the case of provisions "arguably subject" to that jurisdiction. *Compare San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245 (1959).

The proper relief here would have been to enjoin the elections affected by the state's enforcement of the statute. *Bush* v. *Martin,* 224 F. Supp. 449 (S.D. Tex. 1963), *aff'd,* 376 U.S. 222 (1964). Having sought such relief, appellants are now entitled to have the improperly-held elections set aside, *Hamer* v. *Campbell,* 358 F.2d 215 (5th Cir. 1966), and the use of the statute in the 1968 and subsequent elections enjoined.

CONCLUSION

House Bill No. 68 is no more than an inventive means of maintaining white political supremacy in Mississippi which has resulted from denying Negroes the vote for many years. Yet because the statute does not say in so many words that former slaves may not vote or that the state voting registrar may register whomever he pleases, it is claimed that this statute does not deal with a voting practice or procedure. Appellants submit that this sort of "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination"[14]

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[14] *South Carolina* v. *Katzenbach,* 383 U.S. 301, 335 (1966). What this Court meant was well described by the Attorney General, testifying before the House of Representatives:

> "*Mr. Katzenbach:* The justification is simply this: Our experience in the areas that would be covered by this Bill has been such as to indicate frequently on the part of state legislatures

was precisely what Congress expected from the State of Mississippi. Mississippi should not be allowed to thwart Congress by the devious expedient of calling a spade a shovel and saying they are different.

For the reasons stated above, this Court should note probable jurisdiction and reverse the judgment of the court below.

Respectfully submitted,

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a desire in a sense to outguess the Congress of the United States. I refer, for example to the new voter qualifications that have been put into statutes of Louisiana, Mississippi and Alabama following the enactment of the 1964 Act which made things more difficult for people to vote . . . .

"The same thing was true, as the Chairman may recall, in Louisiana at the time of the initial school desegregation, where the legislature passed I don't know how many laws in the shortest period of time. Everytime the judge issued a decree, the legislature . . . passed a law to frustrate that decree." House Hearings 60.

APPENDIX A

IN THE [illegible] COURT
FOR THE [illegible] OF MISSISSIPPI
[illegible]

[illegible] Action No. [illegible]

[illegible], et al., *Plaintiffs*

PAUL B. JOHNSON, Governor of the State of Mississippi, et al., *Defendants*

Before [illegible], Circuit Judge, and Cox and [illegible], District Judges.

APPENDIX

BY THE COURT:

The parties to this suit have stipulated: "That the only issue before the Court at this time is whether or not House Bill 48, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, is an attempt by the State of Mississippi *to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964*, (language of 48 U.S.C. 2[illegible])." (See Stipulation, dated September [illegible], 1966, attached as Appendix A.)

This complaint was filed on October 20, 1966 by these named plaintiffs, Reverend Clifton Whitley, Dock Drum[illegible] and [illegible] Sanders, on behalf of themselves and all other persons similarly situated, as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. In the complaint plaintiffs prayed that this Court adjudge and declare House Bill 48, Mississippi Laws 1966 (hereinafter referred to as Chapter 613 of the Mississippi [illegible] of 1966), which amended Section 3260 of the [illegible]

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

v.

PAUL B. JOHNSON, Governor of the State of Mississippi, ET AL., *Defendants*

Before AINSWORTH, Circuit Judge, and COX and RUSSELL, District Judges.

BY THE COURT:

The parties to this suit have stipulated: "That the only issue before the Court at this time is whether or not House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, is an attempt by the State of Mississippi *to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964;* (language of 42 U.S.C. 1973c)." (See Stipulation, dated September 25, 1967, attached as Appendix A.)

This complaint was filed on October 20, 1966 by three named plaintiffs, Reverend Clifton Whitley, Dock Drummond and Emma Sanders, on behalf of themselves and all other persons similarly situated, as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. In the complaint plaintiffs prayed that this Court adjudge and declare House Bill 68, Mississippi Laws 1966 (sometimes referred to as Chapter 613 of the Mississippi Laws of 1966), which amended Section 3260 of the Mississippi

Code of 1942, to be in violation of Section 5 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments of the United States Constitution; that a preliminary and permanent injunction issue enjoining defendants from enforcing Chapter 613, from failing to accept the petitions of the named plaintiffs as independent candidates in the November 8, 1966 Mississippi general election, and from failing or refusing to include the names of plaintiffs, and all other similarly situated, as candidates who qualify on the official ballots for the November 8, 1966 general election.

A three-judge District Court was requested and thereafter convened for a hearing at Biloxi, Mississippi, on October 26, 1966. The Court, under its full equity jurisdiction, suspended the application of House Bill 68, Mississippi Laws 1966, and ordered that the names of the plaintiffs who were candidates for national office be placed on the ballot to be used by the electors at the general election in Mississippi on November 8, 1966. The Court did not pass on the question whether House Bill 68 denies or abridges any right to vote on account of race or color as provided by 42 U.S.C. § 1973c.

Subsequently, counsel for complainants requested that we set this case for hearing on the merits, and a Stipulation was entered into on September 25, 1967 between counsel for complainants and defendants which has been filed herewith in the record and is submitted to eliminate the need for further hearings in this case.[1] Plaintiffs submitted their brief on October 6, 1967 and defendants' reply brief was received on October 18, 1967. Plaintiffs seek a prompt decision on behalf of the class of plaintiffs who have attempted to qualify and run as independent candidates in the impending Mississippi general election on November

[1] See letter dated September 25, 1967 to counsel for plaintiffs to the members of this Court reproduced as Appendix B.

7, 1967. The matter, therefore, is before us on the merits for final decision.

House Bill 68, Mississippi Laws 1966, amended the existing Mississippi law by making four changes from the original statute as follows: (1) No person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election; (2) the numbers of signatures of qualified electors needed on the petition of an independent candidate have been increased; (3) each qualified elector must personally sign the petition for an independent candidate and include his polling precinct and county; and (4) the time for filing as an independent candidate is substantially earlier. All such amendatory sections apply equally to white and Negro candidates.[2]

According to the Stipulation, it is clear that the State of Mississippi is a State with respect to which the prohibitions set forth in 42 U.S.C. § 1973b(a) (Voting Rights Act of 1965) are in effect and is, therefore, subject to the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) and that said State was affected by the aforesaid provisions on June 11, 1966 (when House Bill 68, Mississippi Laws 1966, was enacted) and continuously to this date. It is also true that the State of Mississippi in enacting House Bill 68, Mississippi Laws 1966, did not comply with the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) in that it did not submit said statute either to the United States District Court for the District of Columbia for a declaratory judgment, that such enactment does not have the purpose and will not deny

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[2] In 1927, the Supreme Court of Mississippi interpreted this statute which was then Section 3717, Mississippi Code of 1906, in *Ruhr* v. *Cowan*, 112 So. 386. After amendments, the statute became Section 3260, Mississippi Code of 1942. Following a ruling of the Court in *Bowen* v. *Williams*, 117 So. 2d 710, the 1966 amendment followed.

or abridge the right to vote on account of race or color, or to the Attorney General of the United States for his approval or objection. The Court notes that 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) is concerned with enactments by a state with respect to which the prohibitions set forth in § 1973b(a) are in effect, and in order to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or in effect on November 1, 1964, such state must institute the declaratory action in the United States District Court for the District of Columbia or submit the matter for approval or rejection to the Attorney General of the United States.

The Mississippi statute under consideration (House Bill 68) is directed solely to the qualifications of candidates, whereas Section 5 has reference to the qualifications of voters. We do not believe that the Mississippi statute is of the kind which Section 5 of the Voting Rights Act of 1965 was designed to prevent. The Mississippi statute under attack does not appear on its face to be one designed or intended to effect a discrimination or qualification relating to the person or voting rights of the individual. The Act does not deal with voting but deals with elections, and more particularly the candidates; therefore, it does not impinge upon Section 5 of the Voting Rights Act of 1965.

The State of Mississippi, prior to this Act, suspended its enforcement of statutory voter qualifications, including tests of literacy, and the Court takes judicial notice of the fact that over 160,000 Negroes have qualified to vote since 1963. Cases cited in plaintiffs' brief have been noted, and none show the application of Section 5 of the Voting Rights Act of 1965 to the kind of statute here involved. The legislative history of the Act is indicated in both plaintiffs' and defendants' briefs, citing portions of a hearing before the Judiciary Committee of the Senate. These exchanges between Attorney General Katzenbach and the

senators are confined to questions involving qualifications of voters. On the 1966 motion in this case, the Court took jurisdiction under 42 U.S.C.A. § 1983 and § 1973c but made no application of § 1973c to the ruling therein. It declines to do so here.

The Court judicially knows (from all but seven counties in Mississippi in which the information was not available) that sixty-seven Negroes did qualify as candidates in the Democratic primary elections of 1967 and seventeen were nominated for the general election.

The motion for an interlocutory injunction is accordingly denied, and the complaint in its entirety is without merit and is dismissed.

The judgment incorporating this per curiam opinion by reference thereto may be presented and signed by the managing judge of this Court as the order of the entire Court.

ROBERT A. AINSWORTH, JR.
United States Circuit Judge

WILLIAM HAROLD COX
United States District Judge

DAN M. RUSSELL, JR.
United States District Judge

Dated:

[Appendices A and B to Opinion of the District Court]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

v.

PAUL B. JOHNSON, Governor of the State of Mississippi, ET AL., *Defendants*

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for all of the parties as follows:

1. That the state of Mississippi is a State with respect to which the prohibitions set forth in 42 U.S.C. § 1973b(a) (Voting Rights Act of 1965) are in effect and is therefore subject to the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965). The State of Mississippi was affected by the aforesaid prohibitions and subject to the aforesaid provisions on June 11, 1966 and continuously to this date;

2. That the State of Mississippi, in enacting House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, did not comply with the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) in that the State of Mississippi did not submit said statute *either* to the United States District Court for the District of Columbia for a declaratory judgment *or* to the Attorney General of the United States for his approval or objection. This is not to be construed as a concession by the defendants that the State of Mississippi was under any lawful obligation to so comply with the provisions of 42 U.S.C. § 1973c;

3. That one or more Negro independent candidates for political office in the Mississippi general election scheduled

for November 7, 1967 has or have been challenged and disqualified from having his or their names placed on the ballot in said election by virtue of having certain provisions of House Bill 68, Mississippi Laws 1966, which amended Section 3260, Mississippi Code of 1942, applied to him or them. In particular, the following provisions of said statute have been applied to one or more of said Negro independent candidates who attempted to so qualify:

> "No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election . . ."

4. That some of the aforesaid Negro independent candidates who have been so challenged or disqualified are members of the class of plaintiffs described in the complaint herein;

5. That the only issue before the Court at this time is whether or not House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, is an attempt by the State of Mississippi *to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964;* (language of 42 U.S.C. 1973c).

6. That this stipulation shall be filed with the Court.

Dated: September 25, 1967

ALVIN J. BRONSTEIN
Attorney for Plaintiffs

Dated: September 25, 1967

WILL S. WELLS
Attorney for Defendants

LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE
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ALVIN J. BRONSTEIN, CHIEF STAFF COUNSEL

September 25, 1967

Hon. Robert A. Ainsworth, Jr.
United States Court of Appeals
400 Royal Street
New Orleans, Louisiana

Hon. W. Harold Cox
P. O. Box 2447
Jackson, Mississippi

Hon. Dan M. Russell, Jr.
P. O. Box 1930
Gulfport, Mississippi

Re: WHITLEY v. JOHNSON
Civil Action No. 4025(J)

To the Judges of this Honorable Court:

Mr. Wells, on behalf of the defendants, and myself have finally entered into a stipulation in the above cause. We have today filed the original and three copies of same with the Clerk in Jackson, but I am enclosing additional copies herewith so that the Court may see that we have stipulated both as to all of the facts as well as to the sole issue we believe to be before the Court at this time.

Since all of the parties would hope to obtain a ruling from the Court prior to the November 7, 1967 general election in Mississippi, Mr. Wells and I have agreed that I will submit a brief on behalf of the plaintiffs within ten days from today and Mr. Wells will submit his brief on

behalf of the defendants within ten days after he receives plaintiffs' brief, all, of course, subject to any different or further direction from the Court.

Both Mr. Wells and myself would welcome the opportunity, if possible, to attend before the Court for the purpose of answering any questions the Court might have, as well as to amplify our written argument.

Respectfully,

ALVIN J. BRONSTEIN
Alvin J. Bronstein

cc: Will S. Wells, Esq.

APPENDIX B

The text of section 3260, as it was before and after the 1966 amendment, follows. Brackets indicate material deleted by House Bill No. 68; italics indicate material added by House Bill No. 68:

3260. Ballots; what to contain.

The ballot shall contain the names of all candidates who have been put in nomination, not less than forty (40) days previous to the day of the election, by the primary election of any political party. There shall be printed on the ballots the names of all persons so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. *No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election; any independent*

candidate must qualify on or before the time established by statute for qualification of candidates seeking nominations in primary elections. The commissioner shall [also] have printed on the ballot in any [general or special] election the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office *as an independent candidate* by a petition *filed on or before the statutory time* [with said commissioner not less than forty (40) days prior to the election], and signed by not less than the following number of qualified electors:

(a) For an office elected by the state at large, not less than [one thousand (1,000)] *ten thousand (10,000)* qualified electors.

(b) For an office elected by the qualified electors of a supreme court district, not less than [three hundred (300) qualified electors] *three thousand five hundred (3,500)* qualified electors.

(c) For an office elected by the qualified electors of a congressional district, not less than [two hundred (200)] *two thousand (2,000)* qualified electors.

(d) For an office elected by the qualified electors of a circuit or chancery court district, not less than [one hundred (100)] *one thousand (1,000)* qualified electors.

(e) For an office elected by the qualified electors of a county, a senatorial *district,* [or floatorial district,] *a supervisors district,* or a municipality having a population of one thousand (1,000) or more, not less than *ten per cent (10%) of the qualified electors of said county, senatorial district, supervisors district, or municipality,* or not less than *five hundred (500)* [or not less than fifty (50)] qualified electors, *whichever is the lesser.*

(f) For an office elected by the qualified electors of a supervisors district or a municipality having a population of less than one thousand (1,000) [not less than fifteen (15)] *ten per cent (10%)* of the qualified electors *of said supervisors district or municipality.*

Each elector shall personally sign said petition which signature shall not be counted unless same includes his polling precinct and county.

There shall be attached to each petition above provided for upon the time of filing with said commission, a certificate from the appropriate registrar or registrars showing the number of qualified electors appearing upon each such petition which the registrar shall furnish to the petitioner upon request.

[Unless the petition required above shall be filed not less than forty (40) days prior to the election,] *Unless the petition required above shall be filed not later than the time required for primary elections,* the name of the person requested to be a candidate, unless nominated by a political party, shall not be placed upon the ballot. The ballot shall contain the names of each candidate for each office, and such names shall be listed under the name of the political party such candidate represents as provided by law and as certified to the circuit clerk by the State Executive Committee of such political party. In the event such candidate qualified as an independent as herein provided, he shall be listed on the ballot as an independent candidate.

Provided, however, that municipal general elections should be held in the manner provided by Section 62, Chapter 491, Laws of 1950, and the names of persons nominated in the primary elections in municipalities, as provided by section 63 of said chapter 491, Laws of 1950, shall be placed upon the ballot in such general municipal elections, notwithstanding any limitation of time which may be otherwise imposed herein.

Provided further, however, that nothing in this act shall prohibit special elections to fill vacancies in either house of the legislature from being held as provided in Section 3295, Mississippi Code of 1942, as amended. And in all elections conducted under the provisions of Section 3295 the commissioner shall have printed on the ballot the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office by a petition filed with said commissioner not less than five (5) days prior to the election, and signed by not less than fifty (50) qualified electors.

APPENDIX C

Since November 1, 1964 the State of Mississippi has passed at least 18 laws which change voting practice or procedures.

Special Session, 1965

1. Senate Bill 1501 (§ 3209.6*)—modified application form for voter registration
2. Senate Bill 1502 (§ 3209.7)—applicant for voter registration must read and write, and fill out the application form
3. Senate Bill 1504 (§ 3212)—applicant must sign the registration book
4. Senate Bill 1505 (§ 3212.5)—removed requirement that voter be of "good character"
5. Senate Bill 1506 (§ 3235)—summary of who is entitled to vote; voter must be able to read and write
6. Senate Bill 1507 (repealed § 3213)—repealed requirement that applicant interpret section of constitution and explain duties of citizenship
7. Senate Bill 1508 (repealed § 3212.7)—repealed requirement that applicant's name be published
8. Senate Bill 1509 (repealed § 3217-01 et seq.)—repealed right of third parties to challenge registration of a voter
9. Senate Bill 1510 (repealed § 3273)—repealed all aid to illiterate voters; *see United States* v. *Mississippi*, 256 F. Supp. 354 (S.D. Miss., 1966) (three judge court)
10. Senate Bill 1534 (§ 3825.504)—established procedure for transition to council-manager municipal government

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* All references are to the Mississippi Code of 1942, as amended and Recompiled, and show Bill number, Code reference, and subject matter.

Regular Session, 1966

1. House Bill 69 (§ 3119)—party primary expenses paid from public treasury, if party received one-third of vote in last election for governor

2. House Bill 779 (§ 3292, § 3293, § 3294)—revised provisions for elections to fill vacancy in county and municipal offices

3. House Bill 223 (§ 2870)—established procedure for county at-large elections for county district offices; *see Fairley* v. *Patterson,* No. 1058, October Term 1967 (Supreme Court of the United States)

4. House Bill 73 (§ 4062)—allowed court houses in specified counties to be closed on Saturday

5. House Bill 183 (§ 6271-08)—established procedure for appointing county superintendent of education; *see Bunton* v. *Patterson,* No. 1059, October Term 1967. (Supreme Court of the United States)

6. Senate Bill 1966 (§ 6271-03.5)—established procedure for county at-large elections for board of education

7. House Concurrent Resolution 36 (Mississippi Constitution, Article 14, § 271)—amended constitution so that the legislature may consolidate counties, *see M.F.D.P.* v. *Johnson,* Civil Action No. 4082, S.D. Miss.

Regular Session, 1968

1. House Bill 19 (§ 3304)—amending procedure for a special election to fill vacancy for Congress—extending time for holding election, and reducing the number of electors to sign nominating petition from 2,000 (as required by new section 3260, the statute in this case) to 1,000.

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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 3

RICHARD ALLEN, ET AL.,

Appellant,

v.

STATE BOARD OF ELECTIONS, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

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Richmond, Virginia 23219

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IN THE

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Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

---

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated December 5, 1967, the Attorney General of Virginia was requested to file a response to the appeal taken from an order of the United States District Court for the Eastern District of Virginia denying appellants' request for injunctions and dismissing their complaint. In accordance with the request

contained in the above-mentioned communication,* written by the Clerk at the direction of this Court, the within response is filed. The appellees, believing the matters set forth herein will demonstrate the lack of substance in the questions sought to be presented by this appeal, file this statement in opposition to appellees' jurisdictional statement and include their motion to affirm the judgment of the court below upon the ground that the question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On November 26, 1966, appellants instituted in the United States District Court for the Eastern District of Virginia this suit for preliminary and permanent injunctions allegedly to restrain the enforcement, operation and execution of Section 24-252 of the Code of Virginia (1950) by restraining the defendant election officials and their successors in office from failing or refusing to count, and from requiring or permitting any other election officials to fail or refuse to count, any vote hereafter given for any person solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter.

Jurisdiction was invoked under 28 U.S.C.A. 1331 and 1343(3), (4); the Voting Rights Act of 1965, 42 U.S.C.A. 1973 *et seq.;* the Fourteenth Amendment to the Constitution of the United States and 28 U.S.C.A. 2281 and 2284—the latter two statutes providing for the convening of a District Court of three judges to hear and determine suits in which restraint of the enforcement of a State statute,

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* *Post,* Appendix A.

upon the ground of such statute's constitutionality, is sought.

A District Court of three judges having been designated by the Chief Judge of the United States Court of Appeals for the Fourth Circuit, the matter was heard on the merits on April 11, 1967. Subsequently, the District Court rendered its opinion denying the prayer of appellants' complaint and dismissing the suit. See, *Allen* v. *State Board of Elections*, 268 F. Supp. 218. On May 2, 1967, a final order effectuating this opinion was entered. Jurisdictional Statement, Appendix, p. 9a.

STATEMENT OF FACTS

Plaintiffs are citizens of the Commonwealth of Virginia registered to vote in one of the precincts or wards of one of the several counties and cities comprising the Fourth Congressional District of Virginia. Defendants are the State Board of Elections of the Commonwealth of Virginia and various individuals who were, on November 8, 1966, either judges or clerks of election in certain precincts located in Greenville County, Cumberland County and Powhatan County, Virginia.

Plaintiffs allege that, at the general election held on November 8, 1966, they were furnished official ballots on which were printed the names of two candidates for election to the House of Representatives of the United States from the Fourth Congressional District of Virginia. They further allege (1) that they inserted the name "S. W. Tucker" on the official ballot, immediately under the names of the two candidates printed thereon, by pasting on the official ballot a sticker or paster upon which the name "S. W. Tucker" had been printed and (2) that they made a check, cross mark or line on the ballot immediately preceding the name thus inserted and thereafter deposited such ballots in the ballot

boxes. The ballots thus altered or marked were not officially counted or included in the official returns as votes validly cast for the said S. W. Tucker.

On August 6, 1965, the Voting Rights Act of 1965 (Public Law 89-110, 79 Stat. 437) enacted by the Congress of the United States became effective in Virginia. This Act had the effect of suspending literacy tests and similar voting qualifications throughout the Commonwealth for a specified period by prescribing that no person might be denied the right to vote in any election because of his failure to comply with a "test or device" as defined by the statute. As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any class.

On August 12, 1965—within a week of the effective date (August 6, 1965) of the Voting Rights Act of 1965—the Honorable Levin Nock Davis, Secretary of the defendant State Board of Elections, sent to all registrars of the Commonwealth of Virginia a bulletin advising them that the Voting Rights Act of 1965 was in force in Virginia and that use of the Virginia registration form in the manner formerly required by Virginia law was prohibited. The above-mentioned bulletin contained the following instructions:

> "The Registrar shall review the forms in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely, or if the applicant is not able personally to complete the forms in whole or in part because of lack of literacy or otherwise, or has

difficulty in doing so, the Registrar shall orally examine the applicant and record the pertinent information on the forms or otherwise assist the applicant in completing the forms. After the forms are completed, the Registrar shall require the applicant to take an oath or affirmation as to the truth of the answers and to sign his name or make his mark thereon."

Subsequently, on October 15, 1965 Mr. Davis also sent to the general registrars and the secretaries of the various electoral boards throughout the Commonwealth—to be delivered by the latter to all judges of election—a further bulletin which informed and instructed all judges of election that:

"On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

"These instructions also apply to precincts in which voting machines are used."

The instructions contained in the above-mentioned bulletins continue in full force in the Commonwealth so long as the Voting Rights Act of 1965 remains effective in Virginia.

THE STATUTES INVOLVED

Under consideration in the instant proceedings are Sections 24-251 and 24-252 of the Code of Virginia (1950) as amended which provide:

"§ 24-251.—Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months."

"§ 24-252.—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (X or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

QUESTION PRESENTED

Is Section 24-252 of the Virginia Code violative of the Fourteenth Amendment to the Constitution of the United States or the Voting Rights Act of 1965?

ARGUMENT

Section 24-252 Of The Virginia Code Is Not Violative Of The Fourteenth Amendment To The Constitution Of The United States Or The Voting Rights Act Of 1965.

In the instant case, it is important to realize at the outset that the Virginia statute under attack by appellants—Section 24-252 of the Virginia Code—*has been superseded by the Voting Rights Act of 1965.* With the advent of the Voting Rights Act, which suspended in Virginia any requirement that a voter be able to read, write or understand any matter in registering to vote or in voting, the requirement of Section 24-252 that the inserted name of a "write-in" candidate be in the handwriting of the voter was superseded and was no longer enforceable or enforced in Virginia.

Equally important is it to realize that the above-stated propositions *were conceded by appellees in this case from the beginning*, and no attempt whatever was made to assert the efficacy of the challenged enactment in this regard. On the contrary, appellees established in evidence and emphasized in argument that within a week of the effective date of the Voting Rights Act of 1965—and before the case of *South Carolina* v. *Katzenbach,* 383 U. S. 301, was even instituted in this Court—the defendant State Board of Elections issued a bulletin instructing all registrars to register all persons who were unable themselves to register because of a lack of literacy. *Ante,* p. 4. The language in which this bulletin was couched was transposed almost verbatim from the Federal regulations implementing the Vot-

ing Rights Act, and the substantial identity of language clearly indicates that every effort was made to conform the applicable Virginia law precisely to the requirements of the Federal statute. See, Appendix B, *post*. In addition, on October 15, 1965—some three weeks before the first general election held in Virginia after the effective date of the Voting Rights Act—the defendant State Board of Elections sent to all general registrars and to all secretaries of the various local electoral boards for transmittal to all judges of elections, a further bulletin instructing all judges of elections to render assistance to any voter who was unable to mark or cast his ballot, in whole or in part, because of a lack of literacy. *Ante*, p. 5. As the District Court noted, the instructions contained in these bulletins continue in full force in the Commonwealth so long as the Voting Rights Act of 1965 remains effective in Virginia. Jurisdictional Statement, Appendix, p. 7a.

Despite the requirement of the challenged statute that the inserted name of a "write-in" candidate be placed on the ballot in the handwriting of the voter, provision is made, by the reference to Section 24-251 of the Virginia Code—for the assistance of physically handicapped voters by the judges of election, who are (1) authorized by the latter provision to assist a physically handicapped voter "in the preparation of his ballot in accordance with" the instructions of the voter and (2) forbidden, under penal sanction, from divulging or indicating in any manner, by sign or otherwise, the name or names of the persons for whom any physically handicapped voter cast his ballot. When the Voting Rights Act of 1965 became effective in Virginia, the provisions of Section 24-251 of the Virginia Code were broadened by the instructions of the State Board of Elections to include the educationally handicapped as well as

the physically handicapped within the provisions permitting assistance, and thus render Virginia law consistent with the commands of the Federal statute. These instructions of the State Board of Elections removed from the operative Virginia law any requirement that a person be able to comply with any "test or devite" as defined in the Voting Rights Act.

In light of the foregoing, appellants cannot assert, and did not assert, that they are now required to be able to read or write in order to vote in Virginia, or that they are denied the right to vote for failure to comply with any test or device. With particular reference to the questions presented in the case at bar, Virginia law does not permit stickers or pasters to be utilized by voters in casting or marking their ballots under any circumstances, regardless of the physical or educational condition of the individual voter. In this connection, appellants assert that Section 24-252 of the Virginia Code—*to the extent that it forbids them to utilize stickers or pasters in casting their ballots*—infringes rights secured to them by the Fourteenth Amendment and the Voting Rights Act of 1965.

Initially in this connection, it is significant that no case supportive of appellants' contention can be found. As the District Court pointed out (Jurisdictional Statement, Appendix, p. 3a):

> "The plaintiffs' contention that Section 24-252 violates the Fourteenth Amendment because it discriminates against illiterates is not supported by authority."

However, as the District Court also noted, there is no want of authority upon this point, and decisions sustaining and justifying a legislative determination to forbid the use of stickers or pasters are legion. In this connection, the District

Court observed (Jurisdictional Statement, Appendix, p. 3a):

> "The propriety of stickers is a matter for legislative, not judicial determination. *Arguments for and against their use abound. Stickers have been lauded for facilitating voting and denounced as conducive to fraud and confusion.* Their use has been approved under statutes permitting write-ins. Pace v. Hickey, 236 Ark. 792, 370 S.W. 2d 66 (1963); O'Brien v. Board of Elections Comm'rs, 257 Mass. 332, 153 N.E. 553 (1926); Dewalt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771 (1892); State on Complaint of Tank v. Anderson, 191 Wis. 538, 211 N.W. 938 (1927). Illinois forbade their use, Fletcher v. Wall, 172 Ill. 426, 50 N.E. 230, 40 L.R.A. 617 (1898), and the constitutionality of this ban has been upheld. Blackman v. Stone, 101 F. 2d 500, 504 (7th Cir. 1939). (Italics supplied.)

Squarely in point is the decision of the United States Court of Appeals for the Seventh Circuit in *Blackman* v. *Stone*, 7 Cir., 101 F. (2d) 500. That case was a class action by certain residents of Illinois challenging various provisions of the election laws of that State. In a series of decisions, the Supreme Court of Illinois had held that the use of stickers or pasters by voters was forbidden. See, *McSorley* v. *Schroeder*, 196 Ill. 99, 63 N.W. 697; *Roberts* v. *Quest*, 173 Ill. 427, 50 N. E. 1073; *Fletcher* v. *Wall*, 172 Ill. 426, 50 N.E. 230. In the *Blackman* case, plaintiffs contended, *inter alia*, that this provision of the Illinois law was violative of the Fourteenth Amendment. Rejecting this contention the Court declared (101 F. (2d) at 504):

> "It is further contended by appellants that section 288 of the law is invalid because it requires all voters

to vote by printed ballots furnished by the State and forbids the use of other ballots or pasters. There is no merit in this contention. *The section is a reasonable expression of the will of the Illinois Legislature, and is not in any manner inconsistent with any provision of the Federal Constitution.* (Italics supplied.)

Equally manifest is it that the statute in question infringes no right secured to the appellants by the Voting Rights Act of 1965. In light of the present status of the election laws of the Commonwealth, previously emphasized in this brief, it cannot be denied that Virginia law now makes ample provision for the educationally handicapped voter to register and cast his ballot. Precisely in this connection, the District Court declared (Jurisdictional Statement, Appendix, pp. 5a, 7a):

> *"No evidence has been presented that Virginia's prohibition of stickers has been administered in a discriminatory manner. It has not been used to disfranchise any class of citizens.*
>
> * * *
>
> "The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. § 1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. *Under present Virginia statutes and regulations of the Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled."* (Italics supplied.)

It is thus unarguably apparent that no citizen of Virginia, otherwise qualified to vote, is denied the right to vote in any election held in the Commonwealth because of his failure

to comply with any "test or device" as defined in the Voting Rights Act of 1965. Indeed, it is clear that the election laws of Virginia as interpreted and applied by the defendant State Board of Elections since the Voting Rights Act of 1965 became operative in the Commonwealth are fully consistent with all requirements of Federal law.

Essentially in this litigation, appellants assert that they have the right to select the means which they will employ to vote for a "write-in" candidate (i.e., by use of pasters or stickers) regardless of whether or not Virginia law authorizes this method of voting. Apparently, the right exists only in Virginia, for it is clear from the decisional authorities cited by the District Court that the propriety of utilizing stickers or pasters in this fashion is a matter for legislative determination by each State, and statutes of other States barring use of stickers or pasters are not subject to constitutional objection. Thus, as a constitutional proposition at least, appellants' assertion necessarily entails a determination that the Fourteenth Amendment guarantees educationally handicapped voters in Virginia a right which it does not equally secure to educationally handicapped voters in other States.

Implicit in appellants' position is the contention that the right to vote by means of stickers or pasters is a right guaranteed them by the Fourteenth Amendment and the Voting Rights Act of 1965. It is perfectly clear from the decisions of this Court, however—as the District Court pointed out—that the Fourteenth Amendment, *per se*, does not even guarantee an illiterate person the right to vote at all, much less to vote by a method of his own choosing. Moreover, there is obviously nothing in the Voting Rights Act of 1965 or any of its implementing regulations which even remotely suggests that this method of voting is even permissible, much less required, by the Federal statute.

Counsel for appellees submit that the provisions of Virginia law under attack in the instant case abridge no federally protected right of the appellants. Quite to the contrary, Virginia law treats with perfect equality all citizens of the Commonwealth, otherwise qualified to vote, who are unable to cast their ballots in their own handwriting, whether such inability is occasioned by a physical or an educational disability. Surely, a statute which makes such even-handed provision for remedying the deficiencies confronting physically or educationally disabled voters cannot be violative of either the Fourteenth Amendment or the Voting Rights Act of 1965.

CONCLUSION

In light of the foregoing, counsel for appellees submit that the question upon which the decision in this case depends is so unsubstantial as to obviate further argument and that the judgment of the District Court should be affirmed.

Respectfully submitted,

ROBERT Y. BUTTON
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Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for appellees in

the above-captioned matter, hereby certify that copies of this Statement of Appellees Opposing Jurisdiction and Motion to Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post office, with first-class postage prepaid, this 4th day of January, 1968, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Jack Greenberg, Esq. and James M. Nabrit, III, Esq., 10 Columbus Circle, New York, New York 10019, and Oliver W. Hill, Esq., S. W. Tucker, Esq., Henry L. Marsh, III, Esq., and Harold M. Marsh, Esq., 214 East Clay Street, Richmond, Virginia 23219, counsel for appellants

.....

Assistant Attorney General

APPENDIX "A"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

December 5, 1967

The Honorable Robert Y. Button
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219

RE: ALLEN ET AL., V. STATE BOARD OF ELECTIONS ET AL.
No. 661, October Term, 1967

Dear Sir:

An appeal was filed in this Court on September 28, 1967, in the above-entitled case, and my records indicate that you were served with a copy of the jurisdictional statement.

I have been directed by the Court to request that you file a response in this case. Such a response usually takes the form of a motion to dismiss or affirm. Forty printed copies of such a motion, together with proof of service thereof, should reach this office on or before January 4, 1968.

On December 4 the Court entered an order inviting the Solicitor General to file a brief expressing the views of the United States in this case.

Very truly yours,

JOHN F. DAVIS, Clerk
By /s/ E. P. CULLINAN
E. P. Cullinan
Chief Deputy.

EPC:jmh
cc: Jack Greenberg, Esq.
10 Columbus Circle
New York, N. Y. 10019

APPENDIX "B"

FEDERAL REGISTER
VOLUME 30—NUMBER 152
August 7, 1965
Title 45—Chapter 8
CIVIL SERVICE COMMISSION
PART 801—VOTING RIGHTS PROGRAM

§ 801.203. *Procedures for filing application.*

(a) An applicant may obtain an application at the place and during the times set out in Appendix A for the appropriate political subdivision. An application may be completed only at the place where it was obtained and shall be submitted by the applicant in person to an examiner at that place.

(b) An examiner shall review the application in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely or if an applicant is not able personally to complete the application in whole or in part because of lack of literacy or otherwise, or has difficulty in doing so, an examiner shall orally examine the applicant and record the pertinent information on the application or otherwise assist the applicant in completing the application.

(c) After an application is completed, an examiner shall require the applicant to take the oath or affirmation prescribed on the application and to sign his name or make his mark thereon.

SUPREME COURT, U. S.

FILED

FEB 23 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted]25

J. C. FAIRLEY, ET AL.,
Appellants,
vs.
JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,
vs.
JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1058

J. C. FAIRLEY, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Paragraph 1(a) and 1(c) of the Rules of this Court, Joe T. Patterson, et al., Appellees, move that the appeal be dismissed, or, alternatively, that the Judgment of the District Court be affirmed.

QUESTIONS PRESENTED

1. Whether the District Court erred:

(a) In finding that Section 2870 of the Mississippi Code, as amended by the 1966 Session of the Mississippi Legislature does not come within the purview of and is not covered by Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c) for convenience hereinafter referred to as Section 5, so as to require compliance with Section 5 by the State of Mississippi and the Appellee Counties involved in each of the cases consolidated on this appeal, prior to enforcing or applying Section 2870 of the Mississippi Code, as amended; and

(b) In dismissing each of the Complaints of the Appellants, thereby denying the relief requested by the Appellants in each of the consolidated cases.

2. Whether, the November 7, 1967 General Election in each of the Counties appearing herein as Appellees having been held in accordance with Section 2870, as amended (i.e., election at large for County Boards of Supervisors rather than election by Districts), this Court, if it finds that Section 5 of the Voting Rights Act of 1965 was applicable, should order a new election of such County Boards of Supervisors pursuant to the provisions of Section 2870 of the Mississippi Code prior to its amendment by the 1966 Session of the Mississippi Legislature.

STATEMENT OF THE CASE

These consolidated cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 2870 of the Mississippi Code.

Section 170 of the Mississippi Constitution of 1890 provides:

> "Each county shall be divided into five districts, a resident freeholder of each district shall be selected, *in the manner prescribed by law,* and the five so chosen shall constitute the Board of Supervisors of the county, a majority of whom may transact business." (Emphasis added)

Prior to May 27, 1966, each of the Members of the Boards of Supervisors in each of the Counties of Mississippi, including the Appellees, Adams and Forrest Counties, were elected by the qualified electors from their respective districts pursuant to Section 2870 of the Mississippi Code and Section 170 of the Constitution of Mississippi of 1890.

Pursuant to the authority granted the Legislature of Mississippi by Section 170 of the Mississippi Constitution of 1890, effective May 27, 1966, the Legislature of Mississippi amended Section 2870 to provide that Members of the County Board of Supervisors could, at each county's option, be elected at large on a county-wide basis by all qualified electors of the County, and, in good faith, the legislative amendment mandatorily required that if 20% of the qualified electors of the County shall present to the Board of Supervisors a petition objecting to such alternative method within sixty days after the adoption and final publication of any such alternative method, then the Board of Supervisors must call an election, after due notice provided, and the question on the ballot shall be whether the members of the Board of Supervisors shall be elected at large or by districts. The actions of the Appellees, Adams and Forrest Counties, in adopting the "at large" method of election of their Supervisors completely com-

plies with the "one-man, one-vote" mandate of this Court. Moreover, the legislative purpose in adopting the amendment of 1966 was to allow the several counties a method of complying with the mandate of this Court of "one-man, one-vote."

Appellants in their original Complaint asserted a second claim for relief claiming that the Amendment to Section 2870 of the Mississippi Code, and the action taken pursuant thereto by the Appellees, had the purpose and effect of denying or abridging on account of race or color the right to vote of the individual Appellants and the class they purported to represent and further charged said actions prevented the election of Negro candidates to the County Boards of Supervisors and that the said actions deterred potential Negro candidates from running for the Office of County Supervisor in said Counties. This second claim was *dismissed upon the voluntary Petition For Dismissal of the Appellants.*

ARGUMENT

I.

Section 2870 of the Mississippi Code As Amended by the 1966 Session of the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c)

These actions were purportedly brought by two classes of individuals. One class represents individuals who seek or desire to seek the Office of Supervisor and the other class represents the individual voters who cast their votes in the elections for Boards of Supervisors. As to the class representing the candidates, we submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit that the colloquy between

Representative Corman and the Honorable Burke Marshall found at Page 74 of the Hearings before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty-Ninth Congress, First Session on H.R. 6400, Serial No. 2 and here set out for the convenience of the Court forecloses further argument in this regard.

> "MR. CORMAN: We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964. Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?
>
> MR. MARSHALL: The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."

As to the remaining class purported to be represented in these actions, we submit to the Court that Section 2870, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. 1973c). The Voting Rights Act of 1965 is entitled: "An Act to Enforce the Fifteenth Amendment to the Constitution of the United States and for Other Purposes." The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General of

the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

> "This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.
>
> This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.
>
> It will provide for citizens to be registered by officials of the U.S. Government if the State officials refuse to register them.
>
> It will eliminate tedious, unnecessary lawsuits which delay the right to vote.
>
> Finally, this legislation will insure that properly registered individuals are *not prohibited from voting.*" (Emphasis added)

These consolidated cases involve a question that turns upon construction of a Federal Statute. More relevant to the construction of a Federal Statute is the very language which Congress has expressed its policy and from which the Court must extract the meaning more appropriate. *Local 1976, U.B.C. & J.* v. *N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011.

Section 5 uses the words "qualification", "prerequisite", "standard", "practice", or "procedure", five different times. They do, in each instance where they are used, refer only to "voting" which is defined in the Act by Section 14c thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be casted, counted, ". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words, "qualification", "prerequisite", "standard", "practice", or "procedure" are to be applied exclusively to "vote" or "voting", as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis,' that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579.

We submit to the Court that the above quoted words from the company they keep are limited as they apply to "vote" or "voting" and do not apply to the candidates who are voted upon.

The Amendment to Section 2870 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing with vote or voting, but deals exclusively and solely with with the method by which the Supervisors of a County will be elected. Determination of the method by which the vote is to be taken is a matter within the inherent and exclusive jurisdicion of the States and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 791, 86 S.Ct. 803, 822, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is directed to one of these mechanisms which is contained in Section 5 of the Act (42 U.S.C.A. 1973c). This Section contains the proviso that in the event a State or political subdivision shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or in effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively, or by his failure to object or by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as "to yield, accommodate, or to adapt one's self to, to act in accordance with." We suggest to the Court that the use of the word "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice, or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 2870 of the Mississippi Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964, except to permit a person to cast a vote for four additional candidates for the Board of Supervisors of the County in which the person resides.

This mechanism in the Act whereby a person has the right to vote without complying with a voting qualification or prerequisite to voting, or standard, practice, or procedure, with respect to voting different from that in force or effect on November 1, 1964, in truth and in fact, contemplates a new obstacle placed in the path of an individual in the voting procedure and allows that individual to cast his vote, have it counted and included in the appropriate totals of votes casted with respect to candidates and propositions without *complying* with said new procedure. Section 2870, Mississippi Code, as amended, does not concern itself with any act which a person could refuse to *comply* with before voting and the procedure incident thereto.

An application of the plain and unambiguous language of the Act of Congress to the amendment now in question makes it clear that this amendment is not covered by or within the purview of the restriction on new voting regulations imposed by Congress. The Statute, being clear and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon*, 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278, and *United States* v. *McKesson & Robbins, Inc.*, 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 2870, as amended, of the Mississippi Code.

On Page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of "a provision of this kind, you leave it open to

a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting*, and we had to litigate the *new qualifications for voting*." (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C.A. 1973c appears the following:

> SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"
>
> ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.
>
> It occurred to us that there are other ways in which states can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.
>
> This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered."

ATTORNEY GENERAL KATZENBACH: "Yes, Sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices—"

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right;* and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with

giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added).

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

> "FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which has been precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a common-sense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices, or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with

the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator."

The Bill was amended so as to substitute the words "standards, practices or procedures" in lieu of the simple word "procedure". This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the right to register to vote; and did not pertain to the method of electing candidates for office.

The sum total of the remarks directed to 42 U.S.C.A. 1973c in the Congressional Committee Hearing and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C.A., Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress in 42 U.S.C.A. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 2870, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C.A., Section 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under Section 1973b(a) of 42 U.S.C.A. This clearly shows the intent of Congress to include in the terms "qualifications", "prerequisites", "standards", "practices", or "procedures" only those acts

of a State or a political subdivision thereof which would discriminate as to the exercise of the right to vote because of his race or color.

At Page 16 of Appellants' Brief filed with this Court Appellants state that:

> "[E]arlier in the hearing, he [Mr. Katzenbach] gave examples of changes which would not be covered [by 42 U.S.C.A. 1973c]—changes in voting age, resident requirements, and balloting procedures such as changing from paper ballots to machine * * *."

Surely, if as Appellants contend in their Brief, these changes are not within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. 1973c), then Section 2870, Mississippi Code 1942, as amended, could not conceivably fall within the purview of said Section 5 of the Act.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court in *South Carolina* v. *Katzenbach,* supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Section 2870, Mississippi Code 1942, as amended, in no way denies or abridges the right of Appellants to vote because of race or color as prohibited by the Fifteenth Amendment to the Constitution of the United States. In response to the teachings of *Baker* v. *Carr,* 369 U.S. 186, 9 L.Ed.2d 663, 82 S.Ct. 691, and *Reynolds* v. *Sims,* 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362, and their progeny, the Mississippi Legislature during its regular session of 1966, exercising its legislative wisdom under and by virtue of Section 170

of the Mississippi Constitution of 1890, amended Section 2870 of the Mississippi Code of 1942. Although this Court had not at that time held that a County political subdivision was compelled under the equal protection clause to redistrict itself on an equal basis, the United States District Courts of Mississippi have held that such was portended by such teachings of this Court.

The adoption of Orders by the Adams and Forrest Counties Boards of Supervisors whereby the Members of said Boards were to be voted upon by the electorate of each County at large brought these Counties within the ambit of the rationale of *Baker* v. *Carr,* supra, and *Reynolds* v. *Sims,* supra. The rule of "one-man, one-vote," is now a reality in the Counties of Adams and Forrest.

Appellants' right to vote has in no way been denied or abridged by the actions of the Appellees' Boards. Rather than having their votes diluted, as argued by the Appellants, the power of their votes has been increased. Whereas before a voter in a District only cast a vote for a candidate residing in his District under the present method of electing Members of the Boards of Supervisors of Adams and Forrest Counties the same voter cast a ballot for four additional candidates. Under the law of Mississippi the Board of Supervisors can only act as a unit, and then only when the Sheriff and Clerk of the Board are in attendance. (Section 2873, Mississippi Code 1942) This voter can now exert on and have his voting influence felt by not only one member of the Board of Supervisors, but on all five of the members. As stated by this Court in *Fortson* v. *Dorsey,* 379 U.S. 433, 13 L.Ed.2d 401, ... S.Ct. 498:

> "Each District's Senator must be a resident of that District, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interest

of all the people in the county, and not merely those of people in his home district; thus, in fact he is the county's and not merely the District's Senator."

The Amendment to Section 2870, Mississippi Code 1942, authorizes changes in the method of electing Members to the Boards of Supervisors similar to changes which occur in legislative and congressional reapportionment.

The Congressional Redistricting Statute passed by the Mississippi Legislature effective during the 1966 Congressional election was held to be valid and constitutional by an unpublished opinion of the District Court and affirmed by this Court. *Connor, et al.* v. *Johnson, et al.*, No. 999 (1967) 386 U.S. 483, 18 L.Ed.2d 224, 87 S.Ct. 1175.

South Carolina v. *Katzenbach*, supra, stated with clarity that South Carolina, Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina and one county in Arizona had been brought within the coverage formula of the Voting Rights Act of 1965 on August 7, 1965. Subsequent to that time legislative apportionment and/or congressional redistricting have been before the Courts in each of those States. South Carolina—*O'Shields* v. *McNair*, 254 F. Supp. 708; Alaska—*Wade* v. *Nolan*, 414 P.2d 689; Georgia—*Tombs* v. *Fortson*, 241 F. Supp. 65, 16 L.Ed.2d 482, aff., 384 U.S. 210, 16 L.Ed.2d 482, 86 S.Ct. 1464 (May 16, 1966); Louisiana—*Bannister* v. *Davis*, 263 F. Supp. 202; Mississippi—*Connor* v. *Johnson*, supra; Virginia—*Mann* v. *Davis*, 245 F. Supp. 241, aff. 15 L.Ed.2d 35, 382 U.S. 42, 15 L.Ed.2d 35, 86 S.Ct. 181 (October 25, 1965); North Carolina—*Drum* v. *Seawell*, 249 F. Supp. 877, aff., 16 L.Ed.2d 298, 383 U.S. 831, 16 L.Ed.2d 298, 86 S.Ct. 1237 (April 4, 1966); and Arizona—*Klahr* v. *Goddard*, 250 F. Supp. 537.

Some of the cases as above noted were considered and reviewed by this Court. It is significant that such changes, both by the Legislatures of the States covered and the Courts of those States, were in total disregard of the proscriptive provisions of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. 1973c). It is submitted that the reason for this is that such proscriptive provisions were not even thought to apply to these changes. This Court and the Members thereof were well aware of the Voting Rights Act of 1965 and the provisions of Section 5 thereof, having dealt with said Act in *South Carolina* v. *Katzenbach,* supra, decided March 7, 1966. Although this question was not presented in the aforementioned cases, under familar principles, the cases would have been decided on the basis of law controlling at the time the Court rendered its decisions, and therefore the provisions of Section 5 of the Voting Rights Act of 1965 would have been applicable to these litigations. *Foundries* v. *Tri-City Cent. Trades Council,* 257 U.S. 184, 66 L.Ed. 189, 42 S.Ct. 72. *United States* v. *Alabama,* 362 U.S. 602, 4 L.Ed.2d 982, 80 S.Ct. 924. Thus, this Court, in exercising jurisdiction in the above mentioned cases, sub silentio, *decided that changes in regard to congressional redistricting and legislative reapportionment were not within the purview of Section 5 of the Voting Rights Act of 1965.*

This Court approved a method of electing members of the City Council of Virginia Beach, Virginia, similar to the method of electing Members to the Boards of Supervisors of Adams and Forrest Counties. *Dusch, et al.* v. *Davis, et al.,* 18 L.Ed.2d 656. The method used by Virginia Beach, Virginia, was under a charter amendment enacted during the 1966 session of the Virginia State Legislature. Virginia, like Mississippi, is controlled by the proscriptive provision of Section 5 of the Voting Rights Act of 1965.

Virginia Beach, Virginia, did not submit the change in its method of electing city councilmen to the Attorney General of The United States nor did it have said method approved by the United States District Court for the District of Columbia. This plan, enacted after November 1, 1964, was approved by the United States District Court for the Eastern District of Virginia, disapproved by the United States Court of Appeals for the Fourth Circuit and then *approved by this Court in a decision dated May 22, 1967.*

If this change in the method of electing councilmen of Virginia Beach, Virginia, which is almost identical to the change adopted in Adams and Forrest Counties, Mississippi, comes within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. 1973c), then the United States District Court for the Eastern District of Virginia lacked jurisdiction to entertain this cause of action. Jurisdiction for the approval of a change in the voting procedure of a state or political subdivision, thereof, enacted or enforced after November 1, 1964, when said state or political subdivision is controlled by Section 5 of the Voting Rights Act of 1965, is in a court of three judges in the United States District Court for the District of Columbia only, as provided by the Act. This court would have lacked jurisdiction to entertain the appeal since the District Court lacked jurisdiction and, therefore, would have been compelled to dismiss the appeal upon the court's own motion; the court and the members thereof being well aware of the Voting Rights Act of 1965, and Section 5, thereof, having had said act before them in *South Carolina* v. *Katzenbach,* supra, decided March 7, 1966. We suggest to the Court that since this court was aware that Virginia was brought within the coverage formula of the act on August 7, 1965, in approving the Virginia Beach, Virginia change, this Court, sub silentio, found that such change did not come within the pur-

view of Section 5 of the Voting Rights Act of 1965. We further suggest to the court that since the change enacted in 1966 by the legislature of Virginia allowing Virginia Beach, Virginia, to elect seven members of its city councilmen at large, while requiring at least one member to reside in each of the seven boroughs, is perfectly analogous to Section 2870, Mississippi Code, as amended, by which the Legislature of Mississippi in 1966 allowed the Counties of Mississippi to provide that the five members of the county boards of supervisors be elected at large while requiring one member to reside in each of the five districts of the county. Therefore, we respectfully submit to the Court that Section 2870, Mississippi Code, as amended, and the actions taken thereunder, and pursuant thereto, by the counties of Adams and Forrest, appellees herein, do not come within the purview of, and are not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c).

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell,* 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily reveals that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c). This was a three judge court of Alabama, composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon

the grounds that: (1.)That portion of the act had an apparent discriminatory effect; and, (2.)That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (U.S.C.A., Section 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number 536 which extended the terms of the incumbent commissioners should be enjoined because the effect thereof was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c), admitted at page 918 of 253 F. Supp. that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that Section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

The action taken by the Alabama State Legislature is in no way similar to Section 2870 of the Mississippi Code, as amended, and the actions taken thereunder, and by virtue thereof, by the counties of Adams and Forrest.

In the event the appellants' position should be sustained, then the effect, thereof, would be to overrule the decisions of this Court pertaining to the "one man, one vote" rule in the cases previously before this Court originating in those states covered by the Voting Rights Act of 1965. Further, such holding would preclude any future litigation in the states covered by the Act as it pertains to complying with the mandates of this Court in reapportionment so as to have a truly representative form of government. To so hold would mean that the Congress, through the Voting Rights Act of 1965, has withdrawn from the local District Courts of the several states covered by Section 5 of the said Voting Rights Act jurisdiction to entertain such litigation by denying them the authority to approve or disapprove any actions taken by such states or political subdivisions, thereof, whereby said states or political subdivisions realign boundaries of voting districts so as to accommodate them to this Court's "one man, one vote" mandate.

Moreover, to sustain the appellants' position would prevent the realignment of school districts, sometimes necessary in order to comply with the school segregation case of *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 and *United States* v. *Jefferson County Board of Education*, 372 F.2d 836.

In Mississippi and other states covered by the provisions of the Voting Rights Act of 1965, school trustees are elected by the qualified electors from the school districts and bond issues are voted on only by the persons living within a defined district, all of which have existed in the laws of Mississippi prior to November 1, 1964.

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce in-

dividual rights under the Fifteenth Amendment to the extent of defeating other rights guaranteed under the Fourteenth Amendment.

For this Court to dismiss or affirm would in no wise preclude appellants from filing an action in the United States District Court for the Southern District of Mississippi and asserting therein, invidious discrimination. *Dusch* v. *Davis*, 18 L.Ed.2d 656, 660.

CONCLUSION

In conclusion, it is earnestly urged that the decision of the Three Judge District Court is correct and that no substantial question on the merits has been raised or presented by the Jurisdictional Statement filed herein by the Appellants. Therefore, the Motion of Appellees to Dismiss the Appeal should be sustained or alternatively the Judgment of the District Court be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

FEB 23 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. [redacted] 26

SETH BALLARD, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

CHARLES E. BUNTON, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

VERNON TOM GRIFFIN, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES.
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Paragraph 1(a) and 1(c) of the Rules of this Court, Joe T. Patterson, et al., Appellees, move that the appeal be dismissed, or, alternatively, that the Judgment of the District Court be affirmed.

QUESTIONS PRESENTED

1. Whether the District Court erred:

(a) In finding that Section 6271-08 of the Mississippi Code, as amended by the 1966 session of the Mississippi Legislature, does not come within the purview of, and is not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. Section 1973c) so as to require compliance with said Section 5 by the State of Mississippi and the counties involved in each of the cases herein on appeal, prior to enforcing or applying Section 6271-08 as amended; and

(b) In dismissing each of the complaints, thereby denying the relief requested therein.

2. Whether the November 7, 1967, election in each of the counties herein involved having been held in accordance with Section 6271-08, as amended (i.e., no election for County Superintendent having been held), this Court, if it finds that Section 5 of the Voting Rights Act of 1965 should have been complied with as aforesaid, should order an election of such County Superintendent of Education pursuant to the provisions of Section 6271-08 prior to its amendment in 1966.

STATEMENT OF THE CASE

These consolidated cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 6271-08 of the Mississippi Code.

Appellants in their original Complaint asserted a second claim for relief claiming that the Amendment to Section 6271-08 of the Mississippi Code, and the actions taken pursuant thereto by the Appellees, had the purpose and effect of denying or abridging on account of race or color the right to vote of the individual Appellants and the class

they purported to represent, and further charged said actions prevented the election of Negro candidates to the office of Superintendent of Education; and further charged that the said actions prevented potential Negro candidates from holding the office of Superintendent of Education in said counties in violation of the Fourteenth and Fifteenth Amendments to the Constitution. This second claim was *dismissed upon the voluntary Petition for Dismissal by the Appellants.*

ARGUMENT

Section 6271-08 of the Mississippi Code As Amended by the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965.

(42 U.S.C.A., Section 1973c.)

These actions were purportedly brought by two classes of individuals. One class represents individuals who seek or desire to seek the Office of Superintendent of Education and the other class represents the individual voters of the counties involved. As to the class representing the candidates, we submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit that the colloquy between Representative Corman and the Honorable Burke Marshall found at page 74 of the Hearings Before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty Ninth Congress, First Session on H.R. 6400, Serial No. 2, and here set out for the convenience of the Court, forecloses further argument in this regard.

> "MR. CORMAN: We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964.

Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?

MR. MARSHALL: The problem that the bill was aimed at was the problem or registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."

As to the remaining class purported to be represented in these actions, we submit to the Court that Section 6271-08, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A. 1973c) The Voting Rights Act of 1965 is entitled "An Act To Enforce The Fifteenth Amendment To The Constitution Of The United States And For Other Purposes". The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General of the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

"This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.

This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.

It will provide for citizens to be registered by officials of the U. S. Government if the State officials refuse to register them.

It will eliminate tedious, unnecessary lawsuits which delay the right to vote.

Finally, this legislation will insure that properly registered individuals are not prohibited from voting." (Emphasis added)

These consolidated cases involve a question that turns upon construction of a Federal Statute. Most relevant to the construction of a federal statute is the very language in which Congress has expressed its policy and from which the court must extract the meaning most appropriate. *Local 1976, U. B. C. & J. v. N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011.

Section 5 uses the words, "Qualification," "Prerequisite," "Standard," "Practice," or "procedure" five different times. They do, in each instance where they are used, refer only to "voting", which is defined in the Act by Section 14c thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be cast, counted, ". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words, "qualification," "prerequisite," "standard," "practice," or "procedure" are to be applied exclusively to "vote" or "voting," as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis', that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579.

We submit to the Court that the above quoted words, "from the company they keep" are limited as they apply to "vote" or "voting" and do not apply to the candidates who are voted upon.

The Amendment to Section 6271-08 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing with vote or voting, but deals exclusively and solely with the method by which the Superintendent of Education of a county will be chosen. Determination of the method by which a non legislative official is to be elected or appointed is a matter within the inherent and exclusive jurisdiction of the states and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L.Ed. 2d 769, 86 S.Ct. 803, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is directed to one of these mechanisms which is contained in Section 5 of the Act (42 U.S.C.A. 1973c). This Section contains the proviso that in the event a state or political subdivision shall enact or seek to administer any voting or standard, practice or procedure, with respect to voting different from that in force or effect on or before November 1, 1964, without

having same first approved by the Attorney General of the United States either affirmatively or by his failure to object or by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as, "to yield, accommodate, or to adapt one's self to; to act in accordance with". We suggest to the Court that the use of the word, "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice, or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 6271-08 of the Mississippi Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964. It merely provided that County Superintendents of Education in certain counties would be appointed by the Board of Education. This method of selecting a non legislative official is practically identical with the method of selecting a County School Board in Michigan, which was approved by this Court in May, 1967 in *Sailors* v. *Kent Board of Education,* 18 L.Ed.2d 650.

An application of the plain and unambiguous language of the Act of Congress to the Amendment now in question makes it clear that this Amendment is not covered by, or within the purview of, the restriction on new voting regulations imposed by Congress. The Statute, being clear and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon,* 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278, and *United States* v. *McKessen & Robbins, Inc.,* 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 6271-08, as amended, of the Mississippi Code.

On page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of, "a provision of this kind, you leave it open to a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting,* and we had to litigate the *new qualifications for voting.*" (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C.A. 1973c, appears the following:

> SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"
>
> ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.
>
> It occurred to us that there are other ways in which States can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short

periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.

This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered."

ATTORNEY GENERAL KATZENBACH: "Yes, sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices * * *"

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly

be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right;* and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added)

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

"FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which was precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a commonsense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965; Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices or procedures" as used in the Statute

and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge *the right to vote on account of race or color*. (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in Section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator."

The Bill was amended so as to substitute the words "Standards, practices or procedures" in lieu of the simple word "procedure." This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the rights to register to vote; and did not pertain to the method of electing candidates for office.

The sum total of the remarks directed to 42 U.S.C.A. 1973c in the Congressional Committee Hearing and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C.A., Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress in 42 U.S.C.A. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 2870, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C.A., Section 1973c is no longer applicable to

a State or political subdivision once that State or political subdivision has come out from under 42 U.S.C.A., Section 1973b(a). This clearly shows the intent of Congress to include in the terms "qualifications," "prerequisites," "standards," "practices," or "procedures," only those acts of a State or a political subdivision thereof, which would discriminate as to the exercise of the right to vote because of his race or color.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court, in *South Carolina* v. *Katzenbach*, supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily shows that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c). This was a three judge court of Alabama composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon the grounds that: (1) That portion of the act had an ap-

parent discriminatory effect; and (2) That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (U.S.C.A., Section 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number 536 which extended the terms of the incumbent commissioners should be enjoined because the effect, thereof, was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c), admitted at page 918 of 253 F. Supp., that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

In Mississippi and other states covered by the provisions of the Voting Rights Act of 1965, school trustees are elected by the qualified electors from the school districts and bond issues are voted on only by the persons living within a defined district, all of which have existed in the laws of Mississippi prior to November 1, 1964.

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce individual rights under the Fifteenth Amendment to the extent of defeating other rights which states have as announced by this constitution.

For this Court to dismiss or affirm would in no wise preclude appellants from filing an action in the United States District Court for the Southern District of Mississippi and to assert, therein, invidious discrimination: *Dusch* v. *Davis,* 18 L.Ed.2d 656, 660

CONCLUSION

In conclusion, it is earnestly urged that the decision of the Three Judge District Court is correct and that no substantial question on the merits has been raised or presented by the Jurisdictional Statement filed herein by the Appellants. Therefore, the Motion of Appellees to Dismiss the Appeal should be sustained or alternatively the Judgment of the District Court be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 36

CLIFTON WHITLEY, ET AL.,
Appellants,

v.

JOHN BELL WILLIAMS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1174

CLIFTON WHITLEY, ET AL.,
Appellants,

VS.

JOHN BELL WILLIAMS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Paragraph 1(a) and 1(c) of the Rules of this Court, John Bell Williams, et al., Appellees,

move that the appeal be dismissed, or, alternatively, that the Judgment of the District Court be affirmed.

QUESTIONS PRESENTED

1. Whether the District Court erred:

(a) In Finding that Section 3260 of the Mississippi Code, as amended by the 1966 session of the Mississippi Legislature, does not come within the purview of, and is not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C., Section 1973(c)) so as to require compliance with said Section 5 by the State of Mississippi, prior to enforcing or applying Section 3260, as amended; and

(b) In dismissing each of the complaints, thereby denying the relief requested therein.

STATEMENT OF THE CASE

This case deals solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 3260 of the Mississippi Code, as amended.

Appellants, in their original Complaint, charged that Section 3260 of the Mississippi Code, as amended, being House Bill 68 of the Laws of the 1966 Session of the Legislature, violates 42 U.S.C. 1971(a) and the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in addition to coming within the purview of Section 5 of the Voting Rights Act of 1965. These claims were completely eliminated by the stipulation entered into prior to the final Judgment of the District Court. (Pages 6a and 7a, Appendix to Appellees' Jurisdictional Statement)

ARGUMENT

Section 3260 of the Mississippi Code As Amended by the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A., Section 1973c)

This suit is brought by a group of individuals purporting to represent a class of individuals who seek or desire to become candidates for various public offices in Mississippi. We submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit that the colloquy between Representative Corman and the Honorable Burke Marshall found at page 74 of the Hearings Before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty Ninth Congress, First Session on H.R. 6400, Serial No. 2, and here set out for the convenience of the Court, forecloses further argument in this regard.

> "Mr. Corman: 'We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964. Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?'
>
> Mr. Marshall: 'The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort I would like to see it corrected, but that is not what we were trying to deal with in the bill.'"

We submit to the Court that Section 3260, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A. 1973c) The Voting

Rights Act of 1965 is entitled, "An Act to Enforce the Fifteenth Amendment to the Constitution of the United States and for Other Purposes." The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General of the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

> "This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.
>
> This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.
>
> It will provide for citizens to be registered by officials of the U. S. Government if the State officials refuse to register them.
>
> It will eliminate tedious, unnecessary lawsuits which delay the right to vote.
>
> Finally, this legislation will insure that properly registered individuals *are not prohibited from voting.*"

This case involves a question that turns upon construction of a federal statute. Most relevant to the construction of a federal statute is the very language in which Congress has expressed its policy and from which the

Court must extract the meaning most appropriate. *Local 1976, U.B.C. & J.* v. *N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011.

Section 5 uses the words, "qualification", "prerequisite", "standard", "practice or procedure", five different times. They do, in each instance where they are used, refer only to "voting", which is defined in the Act by Section 14c, thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be cast, counted, ". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words, "qualification", "prerequisite", "standard", "practice or procedure" are to be applied exclusively to "vote" or "voting", as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis', that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579.

We submit to the Court that the above quoted words, "from the company they keep", are limited as they apply to "vote" or "voting", and do not apply to the candidates who are voted upon.

The Amendment to Section 3260 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing

with vote or voting, but deals exclusively and solely with the method by which public officers in Mississippi will be chosen. Determination of the method by which a public official is to be elected is a matter within the inherent and exclusive jurisdiction of the states and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 86 S.Ct. 803, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is directed to one of these mechanisms which is contained in Section 5 of the Act. (42 U.S. C.A. 1973c) This Section contains the proviso that in the event a state or political subdivision shall enact or seek to administer any voting or standard, practice or procedure, with respect to voting different from that in force or effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively or by his failure to object or by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as, "to yield, accommodate, or to adapt one's self to; to act in accordance with". We suggest to the Court that the use of the word, "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 3260 of the Mississippi

Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964. It merely provides the method by which a candidate for public office can have his name printed on the official ballot.

An application of the plain and unambiguous language of the Act of Congress to the Amendment now in question makes it clear that this Amendment is not covered by, or within the purview of, the restriction on new voting regulations imposed by Congress. The Statute, being clear and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon*, 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278, and *United States* v. *McKessen & Robbins, Inc.*, 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 3260, as amended, of the Mississippi Code.

On page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of "a provision of this kind, you leave it open to a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting*, and we had to litigate the *new qualifications for voting*." (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C.A. 1973c, appears the following:

SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"

ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.

It occurred to us that there are other ways in which States can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.

This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered."

ATTORNEY GENERAL KATZENBACH: "Yes, sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices—

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right;* and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added)

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

"FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which has been precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a common-sense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of prac-

tice of that kind if its purpose or effect was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator."

The Bill was amended so as to substitute the words "standards, practices or procedures" in lieu of the simple word "procedure". This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the rights to

register to vote; and did not pertain to the method of electing candidates for office.

The sum total of the remarks directed to 42 U.S.C.A. 1973c in the Congressional Committee Hearing and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C.A., Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress in 42 U.S.C.A. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 3260, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C.A., Section 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under 42 U.S.C.A., Section 1973b(a). This clearly shows the intent of Congress to include in the terms "qualifications", "prerequisites", "standards", "practices", or "procedures", only those acts of a State or a political subdivision thereof, which would discriminate as to the exercise of the right to vote because of his race or color.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court in *South Carolina* v. *Katzenbach*, supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily shows that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c). This was a three judge court of Alabama composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon the grounds that: (1) That portion of the act had an apparent discriminatory effect; and (2) That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (USCA, Section 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially, discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

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536 which extended the terms of the incumbent commissioners should be enjoined because the effect, thereof, was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 USCA, Section 1973c), admitted at page 918 of 253 F. Supp., that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce individual rights under the Fifteenth Amendment to the extent of defeating other rights which states have as announced by this constitution.

For this Court to dismiss or affirm would in no wise preclude appellants from filing an action in the United States District Court for the Southern District of Mississippi and to assert therein, invidious discrimination. *Dusch* v. *Davis*, 18 L. Ed. 2d 656, 660.

CONCLUSION

In conclusion, it is earnestly urged that the decision of the Three Judge District Court is correct and that no substantial question on the merits has been raised or presented by the Jurisdictional Statement filed herein by the appellants. Therefore, the Motion of Appellees to Dismiss

the Appeal should be sustained or alternatively the Judgment of the District Court be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 661

RICHARD ALLEN ET AL., APPELLANTS

v.

STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's order of December 4, 1967, inviting the Solicitor General to state the views of the United States.

STATEMENT

In the case of Virginia (J.S. 5a), five other States and certain additional counties (see 30 Fed. Reg. 9897), the Attorney General and the Director of the Census have made the determinations which bring into play the prohibition of Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. (Supp. I) 1973b(a), upon the use of "any test or device" to bar voting in State, federal, or local elections. Virginia itself determined

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that the part of Section 24–252 of its Code that requires write-in votes to be cast in the voter's "own handwriting" was suspended insofar as it applies to illiterates (R. II, 12).

Appellee Board of Elections subsequently instructed all persons who were to serve as judges in Virginia's 1965 general election that any voter "who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy * * * shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter." (J.S. 7a.) Such assistance to illiterate voters was in addition to, and apparently thought like, that which Section 24–251 of the Virginia Code makes available to a physically disabled person "by one of the judges of election designated by himself," and to any blind voter "by a person of his choice." The instruction, in addition, required that such a judge "shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote." (J.S. 7a.) It was the apparent intention of the Board of Elections that any illiterate voter wishing to cast a write-in vote and requiring assistance should do so by requesting a judge of the election to assist him by writing the vote in the judge's handwriting. It appears to have been the intention of the Virginia authorities to apply the 1965 instruction in all future elections. (J.S.7a.)

Appellants are functionally illiterate registered voters for the Fourth Congressional District of Virginia (J.S. 1a). Wishing to vote for S. W. Tucker, a write-in candidate in the 1966 elections for the United States House of Representatives, each plaintiff at-

tempted to cast that vote by pasting on the ballot in the appropriate blank for write-in votes a "sticker"—a gummed label on which Tucker's name was printed—and then marking an X in the appropriate place (J.S. 1a–2a). The appellee election officials refused to count the several thousand votes cast in this manner (J.S. 2a), apparently considering them improperly cast because they were not handwritten by either the voter or a judge of the election.[1]

Appellants then brought this case, seeking a declaratory judgment that § 24–252 of the Virginia Code and the procedures appellee Board of Elections substituted therefor in the case of illiterate voters violate the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act of 1965. The case was tried by a three-judge district court[2] on affidavits and exhibits. There appears to have been no controversy as to any question of fact.

On May 2, 1967, the three-judge district court, in an opinion by then District Judge Butzner, denied the appellants' prayer for injunctive relief and dismissed the compliant (J.S. 1a–9a). The court held: "The propriety of stickers is a matter for legislative, not judicial determination. * * * [E]xclusion of illit-

[1] This refusal apparently did not affect the outcome of the election. The vote for Tucker and his two opponents was as follows: Abbitt, 45,226; Silverman, 14,827; Tucker, 7,907 (R. 61). For this reason appellants sought prospective relief.

[2] The jurisdiction of the district court was invoked under 28 U.S.C. 1331, 1343 (3), (4) and 2201 to enforce rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act of 1965, 42 U.S.C. (Supp. I) 1973 *et seq.*; the three-judge court was sought and convened pursuant to 28 U.S.C. 2281 and 2284.

erate persons from voting, if no other discrimination is practiced, does not violate the Fourteenth Amendment" (J.S. 3a, 4a) and "[t]he requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. 1973b(c)" (J.S. 7a). The appellants have filed a timely appeal from this decision, invoking this Court's jurisdiction under 28 U.S.C. 1253.

DISCUSSION

1. We believe this Court has jurisdiction because the constitutional question presented to and decided by the three-judge district court was not "obviously without merit" and was not foreclosed as clearly unsound by previous decisions of this Court. Cf. *California Water Service Company* v. *City of Redding*, 304 U.S. 252, 255. That question is whether Virginia, in the procedure it has required illiterates to follow when casting write-in votes, has, in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment, accorded illiterate voters the same right to a secret ballot as Virginia law vouchsafes to literate voters. Thereby tendered are such subsidiary issues as whether Virginia may require an illiterate to vote in the handwriting of a State-appointed election judge whose duty of secrecy is not reinforced by the threat of criminal sanctions, while at the same time allowing a literate voter to write his own vote, a physically handicapped voter to be assisted by an election judge who is subjected to criminal penalties if he discloses the nature of the vote, and a blind person to vote in the handwriting of a person of his own choosing.

It was clearly proper to join with the constitutional question a statutory claim for relief based on the 1965 Act. See, e.g., *Zemel* v. *Rusk*, 381 U.S. 1, 6 and n. 2. Therefore, this Court has jurisdiction of the statutory, as well as the constitutional, questions.

2. The designation of Virginia as a State subject to Section 4 of the Voting Rights Act of 1965 made it subject to two disabilities that are pertinent here. First, Virginia was forbidden to make compliance "with any test or device" a condition of voting or registration to vote. Because "test or device" is defined to include "any requirement that a person * * * demonstrate the ability to * * * write * * * any matter," Section 4(c) of the Act, 42 U.S.C. 1973b (c)(1), all Virginia laws making literacy a prerequisite to voting were thereby suspended. We believe that Virginia was correct in concluding—and conceding in the district court—that its statutory procedure for write-in votes was among the suspended provisions, at least insofar as it applies to illiterates.

The second pertinent provision of the 1965 Act, and the one we suggest should be dispositive of the present case, is Section 5, 42 U.S.C. 1973c. That part of the statute suspends in any State subject to the prohibitions of Section 4 the operation of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * * ." Relief from the suspension of any rule falling within this provision may be secured by either of two procedures: (1) submission of the rule to the Attorney

General, in which case it may be used if no objection is interposed within 60 days; or (2) obtaining a declaratory judgment from the United States District Court for the District of Columbia that the rule "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." 42 U.S.C. 1973c; see *South Carolina v. Katzenbach*, 383 U.S. 301, 319–320, 333–334.

The instruction that appellee Board of Elections gave Virginia election judges in 1965 did not expressly deal with the problem of illiterates who wished to cast write-in votes. It was, on its face, an attempt to provide assistance to illiterates in casting their ballots—an effort made by four other States subject to the 1965 Act only after a district court had rendered an appropriate decree upon the petition of the United States.[3] It was also necessary, however, to provide in some manner a means by which illiterates could cast write-in ballots. This was accomplished by allowing illiterates to cast write-in votes in the handwriting of an election official.

The result was assuredly a "practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *." It would appear to follow that the new requirement could not be used without first passing the scrutiny of either the Attorney General or the United States District Court for the

[3] *United States* v. *States of Louisiana*, 265 F. Supp. 703 (E.D. La.), affirmed *per curiam*, 386 U.S. 270; *United States* v. *State of Mississippi*, 256 F. Supp. 344 (S.D. Miss.); *United States* v. *Executive Com. of Dem. Party of Greene Co., Ala.*, 254 F. Supp. 543 (N.D. and S.D. Ala.); *United States* v. *County Executive Com. of Dem. Party of Clarendon County, S.C.*, C.A. No. 66–459 (D.S.C.).

District of Columbia. 42 U.S.C. 1973c. Neither step was in fact taken.[4]

To be sure, there may be circumstances where the failure to comply with Section 5 will be more a formal than a substantive defect. For example, in *South Carolina* v. *Katzenbach, supra,* the Attorney General indicated during argument that he would not interpose an objection to a Mississippi provision extending the closing hours of the polls from 6 p.m. to 7 p.m. 383 U.S. at 320.

Were this also a case where it was clear that the Attorney General would not interpose an objection, we would so state, and thus avoid a purely formalistic rite that would merely delay final determination. We do not believe, however, that the facts of this case admit of so easy a solution to the failure to comply with Section 5. The test to be applied to a practice or procedure submitted pursuant to that section is whether it had "the purpose" or "will * * * have the effect of denying or abridging the right to vote on account of race or color * * *" (42 U.S.C. 1973c).[5] On its face, Virginia's procedure for the casting of write-in votes

[4] Appellants did not rely on Section 5 in the district court but invoke it for the first time in their Jurisdictional Statement (at p. 20). The question, however, is a pure legal issue which may be resolved on the basis of the present record. Since the facts which give rise to that issue are framed by the complaint and are not subject to dispute, this Court could, in all events, consider the issue *sua sponte*. See *Boynton* v. *Virginia*, 364 U.S. 454, 457; cf. *Bell* v. *Maryland*, 378 U.S. 226, 237–242.

[5] The quoted text is, under the statute, to be applied in suits brought under the section in the District of Columbia court. Since that court may approve the use of a practice or procedure to which the Attorney General has objected, we think it evident that the Congress intended the Attorney General, in his scrutiny, to apply the same standard.

by illiterates has no such purpose, and the Attorney General does not now have evidence that such a purpose existed.

But, of course, the very purpose of the submission is to allow the Attorney General to investigate and to consider the facts, and determine whether he believes an improper purpose existed. Moreover, even were there to appear no evidence of such a purpose, the Attorney General would still have occasion to determine the likely effect of Virginia's write-in procedure on the rights guaranteed by the 1965 Act. For example, the Attorney General would find it necessary to compare Virginia's procedure with the relief the United States requested in four other States subject to the 1965 Act. In general terms, the courts were asked to direct election officials to provide assistance to illiterates, and, at the same time, to allow either federal observers, if present, or a private person of the illiterate voter's choosing to observe the casting of the illiterate's vote by the State official. The basis for this approach was the view that the presence of a State official, and no other person in the voting booth, may inhibit the freedom of choice of a previously disenfranchised illiterate Negro voter. The procedure requested was in fact very similar to the one Virginia by statute allows in the case of blind voters.

In particular, Virginia's procedure would have to be contrasted with the relief requested and secured in *United States* v. *Louisiana,* 265 F. Supp. 703, 713 (E.D. La.), affirmed *per curiam,* 386 U.S. 270. There the Attorney General requested, and the court directed, that Louisiana—another of the States subject to the

prohibitions of Section 4 of the 1965 Act—assist illiterates in voting. To this extent, the relief was similar to the instructions appellee Board of Elections issued to Virginia election judges. There were, however, significant additional features in the relief secured that are not present here. Thus Louisiana was directed to allow a representative of an opposing candidate to observe the vote, and to allow the illiterate, if he so requested, the presence of a federal observer in the voting booth. Moreover, election officials granting such assistance to illiterates were ordered, subject to the sanctions of contempt, to maintain absolute secrecy.

Only a submission by Virginia, in the manner Congress indicated in Section 5, would enable the Attorney General to perform the responsibilities which Congress imposed on him with respect to new procedures adopted in States made subject to Section 4.

3. For the above reasons, we believe this to be a case where the courts need not, and should not, adjudicate the legal issues raised until such time as Virginia follows the procedures that Section 5 ordains. Cf. *Far East Conference* v. *United States*, 342 U.S. 570. Because it is clear that Virginia, in 1966, failed to comply with Section 5, we suggest that the district court should be directed to grant such relief as is necessary to guarantee that Virginia will refrain from imposing restrictions upon the manner of casting write-in votes pending compliance with that Section. We suggest that the following considerations would be highly relevant in fashioning that relief: (1) That there is an evident need and justification for affording to illiterates the opportunity for assistance by some

person other than (or at least in addition to) a State election official; (2) that the Commonwealth of Virginia has a legitimate interest, which its legislature has expressed in the now-suspended Section 24–252 of its Code, in avoiding the possibilities of fraud that various States have detected in the use of stickers for write-in votes;[6] and (3) that there seems little reason to deny to illiterates the benefits of a procedure which the State has freely adopted in the case of blind persons who, like illiterates, are unable by themselves to verify the accuracy of a vote cast by an election official.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

STEPHEN J. POLLAK,
Assistant Attorney General.

FEBRUARY 1968.

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[6] It is questionable, however, that the use of a State election official is a rational implementation of the policy that underlies the statute, which is apparently based on the view that the variations in handwritings would lessen the chances of one person fraudulently casting multiple votes. Compare *Morris* v. *Fortson*, 261 F. Supp. 538 (N.D. Ga.), where it was provided that no one person could assist more than ten voters.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1058

J. C. FAIRLEY, ET AL., APPELLANTS

v.

JOE T. PATTERSON, ET AL.

No. 1059

CHARLES E. BUNTON, ET AL., APPELLANTS

v.

JOE T. PATTERSON, ET AL.

No. 1174

CLIFTON WHITLEY, ET AL., APPELLANTS

v.

JOHN BELL WILLIAMS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's orders of March 11 and April 8, 1968, inviting the Solicitor General to state the views of the United States regarding these three cases.

STATEMENT

Pursuant to Section 4(b) of the Voting Rights Act of 1965 (42 U.S.C. 1973b(b)), the Attorney General and the Director of the Census determined on August 6, 1965, that the provisions of Section 4(a) of the Act (42 U.S.C. 1973b(a)) should be applicable to Mississippi, six other States and certain additional counties (30 Fed. Reg. 9897). As a result of this determination, the State of Mississippi was (and continues to be) prohibited under Section 5 of the Act (42 U.S.C. 1973c) from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first submitting such change to the Attorney General of the United States and obtaining his consent or securing a favorable declaratory judgment from the United States District Court for the District of Columbia.

In late spring of 1966, the Mississippi legislature enacted the three statutes which are here at issue:

Fairley v. *Patterson,* No. 1058, involves an amendment to Section 2870 of the Mississippi Code of 1942 which, in effect, gives each county in the State an option to change from district to at-large voting for members of the county's board of supervisors (J.S. 38–43). Prior to the amendment, all counties were required by law to be divided into five districts with the registered voters in each district electing one member to the board. Subsequent to the amendment, Adams and Forrest Counties, following the procedures outlined in the new legislation, chose a system whereby

all candidates must run at large, but "each candidate shall be a resident of the district which he proposes to represent."

Bunton v. *Patterson,* No. 1059, concerns an amendment to Section 6271–08 of the Mississippi Code, which directs that in 11 designated Mississippi counties the office of county superintendent of education should be appointive rather than elective (J. S. 34–41). Prior to the amendment, all the counties involved had the option of electing or appointing that officer. The amendment requires the board of education in each of the counties to appoint an individual to hold that office for a term of not more than four years.

Whitley v. *Williams,* No. 1174, deals with an amendment to Section 3260 of the Mississippi Code, which alters the requirements governing independent candidacies in general elections in Mississippi in four major respects (J.S. 9a–12a). First, it establishes a new rule that no person who has voted in a primary election may run as an independent candidate in the general election;[1] second, it requires independent candidates to qualify to run in the general election at the same time as candidates must qualify to run in the primary election;[2] third, it increases tenfold the number of signatures of qualified electors which must be

[1] Compare *Bowen* v. *Williams*, 238 Miss. 57, in which the Supreme Court of Mississippi construed Section 3260, prior to its amendment, as not prohibiting a person who voted in a primary election from running as an independent candidate in a general election.

[2] Previously, independent candidates had until 40 days before the general election to qualify. They must now qualify 60 days before the primary election. See Section 3118, Mississippi Code of 1942.

included on the nominating petition of an independent candidate; finally, the statute adds the new requirement that each elector shall personally sign the nominating petition and state his polling precinct and county.

There is no dispute that Mississippi enacted and enforced each of these amendments without first submitting these changes to the Attorney General or instituting an action in the District of Columbia court (*e.g.*, J.S. No. 1174, 6a).

Appellants in Nos. 1058 and 1059 represent both the class of persons who wish to run for the offices involved and the class of persons who are eligible vote for such candidates. Appellants in No. 1174 are potential candidates whose nominating petitions for independent listing on the ballot were rejected (J.S. 6–7).[3] The complaints filed by appellants in all three cases requested the impanelment of three-judge district courts under 28 U.S.C. 2281 and Section 5 of the

[3] When the complaint in No. 1174 was first brought, plaintiffs were prospective independent candidates for State offices whose nominating petitions were rejected because they contained insufficient signatures to qualify for a place on the ballot under the amendment to Section 3260. Without reaching the merits, the three-judge court ordered plaintiffs' names placed on the ballot for the 1966 election. *Whitley* v. *Johnson*, 260 F. Supp. 630 (S.D. Miss.). Thereafter, other members of the class of plaintiffs were denied a place on the 1967 ballot for non-compliance with all of the changes made in Section 3260 (J.S. 6–7, 6a–7a). The decision now before this Court grew out of the plaintiffs' attempts to have the three-judge court take action to place the latter group of candidates on the ballot. In regard to the specific laws involved in No. 1174, see Report of the U.S. Commission on Civil Rights, *Political Participation* (hereinafter *Civil Rights Commission Report*), pp. 44–47 (May 1968).

Voting Rights Act of 1965. They alleged, *inter alia*, a violation of the Fifteenth Amendment and of the Voting Rights Act, and requested declaratory judgments invalidating the statutes at issue. In each of the cases it was stipulated prior to the hearing that the only issue before the court was whether or not the statute involved was covered by Section 5 of the Voting Rights Act (J.S. No. 1058, 33, 35–36; J.S. No. 1059, 27–28, 30, 32; J.S. No. 1174, 1a, 7a). In all three cases the three-judge courts which were convened held that the Mississippi legislation "does not come within the purview of and is not covered by" Section 5, and dismissed the complaints (J.S. No. 1058, 33, 36; J.S. No. 1059, 28, 30, 32; J.S. No. 1174, 4a).

DISCUSSION

I

The threshold question in these cases is whether three-judge courts were properly convened so that direct appeals lie to this Court. We note that, until the matter was noticed here in the order requesting the views of the Solicitor General in Nos. 1058 and 1059,[4] no one appears to have doubted the appropriateness of convening a court of three judges. In each case, the plaintiffs requested a three-judge court, the district judge to whom the matter was assigned certified the necessity for convening such a court, and the chief judge of the circuit appointed additional judges.

[4] Although the order in No. 1174 makes no reference to a possible jurisdictional problem, our submission on this point applies to that case also, since, in our view, all three cases are in the identical posture.

At no time did the defendants oppose the convening of a three-judge court and, as appellees here, they do not now suggest any jurisdictional defect.[5] While these facts do not, of course, preclude the issue, they suggest a cautious approach.

In light of the decision in *Swift & Co.* v. *Wickham*, 382 U.S. 111, it seems clear that 28 U.S.C. 2281 did not require the convening of three-judge courts in these cases, which presented only a claim that State statutes must yield, under the Supremacy Clause, to the mandate of the federal Voting Rights Act.[6] See *County Board of Election of Monroe County, New York, et al.* v. *United States*, 383 U.S. 575. The question remains, however, whether Section 5 of the Voting Rights Act itself called for the convening of three-judge courts. That provision reads as follows:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on Novem-

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[5] In each case, appellees have alternatively moved for dismissal of the appeal, but solely on the ground that "no substantial question on the merits has been raised or presented" (No. 1058, Motion 23; No. 1059, Motion 15; No. 1174, Motion 14). This is, of course, a basis for summary affirmance, but not for dismissal in a federal case. See Rule 16(c) of the Rules of this Court.

[6] While direct constitutional challenges to the State statutes, grounded on the Fifteenth Amendment, were originally coupled with claims under Section 5 of the Voting Rights Act, those challenges were, in each case, eliminated by stipulation before hearing and decision.

ber 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Plainly, there is here a mandate for convening a three-judge court to entertain the declaratory action in the District Court for the District of Columbia which a covered State or political subdivision is authorized to initiate by the first sentence of the section.

The present suits, of course, are not of that kind. Yet, they, too, may qualify as "action[s] under this section." The matter is not free from difficulty, but we believe that there is support for the affirmative answer tacitly given by the several judges below.

At the outset, we note that the provision requiring the convening of a three-judge court—at the end of Section 5—is separated from the opening sentence of the section which authorizes actions by State authorities in the District of Columbia court. Although other explanations are possible, a permissible inference is that the last sentence of Section 5 covers more ground.

So also, while the phrase "[a]ny action *under* this section" can be read narrowly as directed only to suits expressly authorized by the section, the more usual meaning of those words would include any suit resting on, or invoking, the provision. That is the usage followed in the Judicial Code with respect to general federal question jurisdiction (28 U.S.C. 1331(a)), and also with respect to jurisdiction of suits "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote" (28 U.S.C. 1343(4))—the very provision invoked by the present appellants.[7] It is worth noting that other provisions of the Voting Rights Act, which plainly

[7] Although the Voting Rights Act itself does not expressly provide for private suits to enforce Section 5, there is, in our view, no question that such proceedings are proper. Section 5 explicitly confers upon individual citizens a right not to be "denied the right to vote for failure to comply with [any new] qualification, prerequisite, standard, practice or procedure" until the new requirement has been approved by the Attorney Gen-

govern only the type of action there specified, use a more restrictive formulation—"such action" (Section 10(c), 42 U.S.C. 1973h(c)), "an action pursuant to this subsection" (Section 4(a), 42 U.S.C. 1973b(a)), "proceedings instituted pursuant to this section" (Section 12(f), 42 U.S.C. 1973j(f)), or "any declaratory judgment pursuant to section 1973b or 1973c" (Section 14(b), 42 U.S.C. 1973*l*(b)).

Finally, it is not inconsistent with the policy of the three-judge court requirement of Section 5 for such a court to be impaneled in these cases. We recognize that

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eral or found innocuous by the District Court for the District of Columbia. Jurisdiction of a suit to vindicate that right would seem to be conferred on the district courts by 28 U.S.C. 1343(4). The special authorization for a similar action by the Attorney General in Section 12(d), (f) (42 U.S.C. 1973j(d), (f)), is, of course, no indication to the contrary; that provision merely confers standing on the Attorney General, who might otherwise not be deemed empowered to vindicate private rights. See *United States* v. *Raines*, 362 U.S. 17, 27.

Nor is there any doubt that these suits were properly instituted in the Southern District of Mississippi, rather than the District of Columbia. The stipulation in Section 14(b) of the Act (42 U.S.C. 1973*l*(b)), denying jurisdiction to district courts other than the District of Columbia court, applies only to the issuance of injunctions "*against* the execution or enforcement of any provision of [the Act]" (*e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 645–646) and to "any declaratory judgment *pursuant to* section 1973b or 1973c of this title [Sections 4 and 5 of the Act]," plainly refers to suits instituted by States or subdivisions. Proceedings to *enforce* compliance with Sections 4 and 5 are not covered. That is made clear in Section 12(f) (42 U.S.C. 1973j(f)) which generally confers on the "district courts of the United States" jurisdiction to entertain injunctive actions by the Attorney General authorized by Section 12(d), which, *inter alia*, includes suits to vindicate Sections 4 and 5. See *United States* v. *County Board of Election of Monroe County, New York, et al.*, 248 Supp. 316 (W.D. N.Y.), appeal dismissed, 383 U.S. 575. The limitation of Section 14(b) is no more applicable to comparable private suits.

the convening of a three-judge court "makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions" (*Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 92 (dissenting opinion)), and that it is therefore appropriate to read any three-judge provision "as an enactment technical in the strict sense of the term and to be applied as such" (*Phillips* v. *United States*, 312 U.S. 246, 251). There are, moreover, delays inherent in the convening procedure which may, on occasion, present problems—even though a single district judge has authority under 28 U.S.C. 2284(3) to grant temporary relief where delay would cause irreparable harm. Yet, Congress obviously concluded that when the governing authorities of a State differ with the Attorney General of the United States over the effect of a change in voting procedures or standards, it is inappropriate to have that difference resolved by a single district judge. Similar considerations may well suggest a court of three judges when the claim being made by a private party is that a State statute of general applicability should be enjoined because the State has not followed the procedures prescribed by federal law to determine whether the statute's purpose or effect is to deny or abridge "the right to vote on account of race or color," contrary to the Fifteenth Amendment. The court is asked to determine whether the State must institute a three-judge court action before it may implement its statute, and, if so, effectively to enjoin the operation of the State law for what may be a substantial period. In the circumstances, it may well have been thought important to avoid "the worrisome

possibilities that economic or political predilections [would] find their way into a judgment" and to insure "greater restraint and dignity at the district court level" by requiring three judges to hear such challenges (*Swift & Co.* v. *Wickham*, 382 U.S. at 127). Under this analysis, the three-judge courts were properly convened here, and the appeals to this Court are proper under 28 U.S.C. 1253 and Section 5 itself.

II

Assuming this Court's jurisdiction on direct appeal, and turning to the merits, it is our position that the courts below in each of these cases erred in concluding that the Mississippi statutes in question are not covered by Section 5 of the Voting Rights Act (42 U.S.C. 1973c). Our submission, of course, does not reach the ultimate issue of the validity of the challenged State laws; the only effect of judgments reversing the district courts would be to stay the implementation of the new statutes until that question is resolved by the District Court for the District of Columbia if the Attorney General, upon investigation, should determine to interpose objections.

We ground our conclusion regarding the applicability of Section 5 both on the literal language and on the legislative history and background of that provision. Section 5 broadly covers "any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" in any State or political subdivision subject to the prohibitions of Section 4(a) of the Act (42 U.S.C. 1973b(a)). It was stipulated in the courts below that Mississippi is a covered State. Section 5 contemplates that such a "qual-

ification, prerequisite, standard, practice, or procedure" will be allowed to go into effect only after a determination, by the District of Columbia court or the Attorney General, that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Section 14(c)(1) of the Act (42 U.S.C. 1973*l*(c)(1)), moreover, defines the term "voting" in sweeping fashion to include "all action necessary to make a vote effective in any primary, special, or general election." Our position, simply stated, is that the three statutes involved in the instant cases all prescribe practices or procedures which may result in abridging the right of Negro citizens to vote by rendering ineffective their exercise of the franchise so recently achieved. Accordingly, the statutes are plainly within the congressional contemplation in enacting Section 5.

We recognize, of course, that the instant cases do not involve statutory changes which, in so many words, alter the existing rules governing the casting of individual ballots. Indeed, appellees' central theme in these cases is that Section 5 is inapplicable because the statutes involved relate only to methods to be utilized in selecting candidates or officeholders, and not in terms to qualifications for individual voters.[8]

[8] Similarly, in the legislative apportionment cases decided by this Court in recent years, individuals had the right to vote, albeit the right of some was impaired through districting arrangements which accorded greater weight to the votes of others. That, indeed, was the crux of the disagreement between the majority and the dissenters in those cases. There, of course, the Court found that the right to vote involved more than the act of casting a ballot, and that the Equal Protection Clause required an equally weighted and effective vote for all citizens.

But the congressional purpose underlying Section 5 was not so narrowly circumscribed, and the significance of the broad statutory language cannot be so easily dismissed. Here it seems clear that the statutes involved affect the electoral process in Mississippi in a direct and significant way, for the challenged laws substantially change the constituency of certain elected officials, wholly remove certain offices from the electoral process, and restrict the availability of certain persons as candidates for public office.

There is surely no doubt today that the right to vote can be curtailed as effectively by an impermissible demarcation of an elected official's constituency as by the destruction of ballots or the refusal to permit access to the voting booth. This Court firmly established that principle in *Gray* v. *Sanders*, 372 U.S. 368, and *Wesberry* v. *Sanders*, 376 U.S. 1, and confirmed it in *Reynolds* v. *Sims*, 377 U.S. 533, 555, stating:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[9]

By a parity of reasoning, if a State otherwise subject to the strictures of the Voting Rights Act can

[9] As Mr. Justice Fortas stated in his dissenting opinion in *Fortson* v. *Morris*, 385 U.S. 231, 250: "It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to the vote, that is protected."

dilute and impair the right to vote by resort to various devices which render the votes cast by newly enfranchised Negroes ineffective, then the bright promise of that enactment for "millions of non-white Americans" might never be realized (*South Carolina* v. *Katzenbach*, 383 U.S. 301, 337).

In explaining the congressional purpose in enacting Section 5, this Court stated in that case (*id.* at 335):

> Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

At an earlier point, the Court noted that "Section 5 prescribes * * * the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination" (*id.* at 315–316). Thus, the language of Section 5 and this Court's references to that provision in its opinion in *South Carolina* v. *Katzenbach* strongly support the view that the section should not be read grudgingly. And this approach is confirmed by the legislative history of Section 5, which plainly indicates that Congress intended it as a broad prophylactic measure, not the narrow and wholly ancillary provision which appellees suggest.

Section 5 was designed to keep the right to vote

free from all potential forms of frustration and impairment by States which had previously pursued a policy of disenfranchising Negroes. Rather than attempting to spell out which kinds of procedures and practices were intended to be covered,[10] Congress spoke in general terms, leaving it to the District of Columbia court or the Attorney General to make the determination as to which side of the line a particular procedure or practice fell. The initial burden would be placed on the State or political subdivision desiring to make a change in a law relating to voting to seek judicial or executive approval. Since Section 5's approval procedure was designed to serve an informing function—to provide "a method of bringing to the attention of the Government changes in State law" (Assistant Attorney General Marshall, *House Hearings,* p. 72), an added impetus to construe its coverage broadly is provided. Indeed, since the Voting Rights Act as a whole was intended to make effective the protections of the Fifteenth Amendment, its reach is no less. Like that amendment, the statute was obviously designed to embrace any effort to establish "sophisticated as well as simple-minded modes of discrimination" (*Lane* v. *Wilson,* 307 U.S. 268, 275; *Gomillion* v. *Lightfoot,* 364 U.S. 339, 342). It is in

[10] Because of the numerous and various changes in voting laws which were potentially reached by Section 5, it was understood, as pointed out by Attorney General Katzenbach, that the intended scope of the section would be "very difficult to express * * * in precise terms without knowing in what State and under what circumstances and conditions" particular changes were made (Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter *House Hearings*), p. 62).

this context, we submit, that the legislative history of Section 5 should be viewed.

The policy behind Section 5 was explained by the then Attorney General in his testimony before the House Committee (*House Hearings,* p. 60):

> Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. * * *
>
> * * * * *
>
> If you look at the past history on this, it seemed to us that the State which had been discriminating in the past should be subjected to some kind of limitations as to any new legislation that it may propose. * * *

During the same House hearings, the Chairman of the House Judiciary Committee described the Section as "all sweeping" (*ibid.*). Similarly, during the Senate hearings Senator Fong inquired whether it would be possible to broaden the proposed bill's language to make it cover changes which might not be encompassed by the word "procedures". The Attorney General replied that he thought that the language then being used was "all-inclusive of any type of practice," but that he would accept a change adding the words "standards" and "practices" to Section 5 (Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pp. 191–192).

During the course of the congressional hearings and debates a variety of examples of changes poten-

tially covered by Section 5 were suggested. Mentioned were changes in the date of an election (remarks of Senator Talmadge, 111 Cong. Rec. 10571); changes in the voting age, residence requirements or property requirements; changes in the frequency and duration that registrars' offices are open; and changes from paper ballots to machines, or vice versa (Attorney General Katzenbach, *House Hearings,* pp. 60–62); and establishment of new voting precincts (H. Rep. No. 439, 89th Cong., 1st Sess., views of Representative Tuck, p. 75). Opponents of the Act attributed a broad scope to the language of Section 5. On the floor of the Senate, Senator Talmadge observed that the provision would prevent a State from enacting legislation which affected State and local elections "in any manner whatsoever" (111 Cong. Rec. 10725).[11] Similarly, proponents of the legislation viewed Section 5 expansively. Senator Hart explained that the provision was designed to end the lengthy "fencing match" provoked by "each thrust of national power designed to protect Negro rights" (111 Cong. Rec. 8303). Congress' objective was, as Senator Tydings noted, to "put an end to this game of cat and mouse which the State legislatures have played for so long" (111 Cong. Rec. 10727). And it is clear that the provision was enacted with full recognition of the warning given by the Attorney General that "there are an awful lot of things that could be started for purposes of evading

[11] See also the further remarks of Senator Talmadge (111 Cong. Rec .10571–10572), and the remarks of Senator Ervin (111 Cong. Rec. 10726).

the 15th amendment * * *" (*House Hearings,* p. 95). In short, both the proponents and opponents of the statute believed that Section 5 was designed to encompass all types of changes which might have a significant effect on the free and effective exercise of the right to vote.

Apart from the legislative history, the limited judicial consideration heretofore given Section 5 supports a broad view of its scope. Indeed, the provision has been accorded a generous interpretation in several opinions in the two cases in which the section was involved. In *Sellers* v. *Trussell,* 253 F. Supp. 915 (M.D. Ala.), an Alabama statute changing the term of office of county commissioners in Bullock County from four to six years was challenged on Section 5 grounds. Circuit Judge Rives was of the view that the measure was suspended by Section 5 because the legislative history showed the provision to be a broadening one which is "all-inclusive of any kind of practice" (253 F. Supp. at 918). Accordingly, Judge Rives concluded that "[p]ostponing an election by extending the terms of office" constituted a change covered by Section 5, since the statute "embodies a practice or procedure respecting voting," although not in terms relating to voter qualifications (*ibid.*).[12] *In South Carolina* v. *Katzenbach,* 383 U.S. 301, as noted

[12] Judge Johnson found it unnecessary to consider the question of the applicability of Section 5, concluding that the statute was unconstitutional on Fifteenth Amendment grounds, and Judge Grooms dissented as to this part of Judge Rives' opinion (see 253 F. Supp. at 918–919).

previously (*supra*, p. 14), this Court, while not attempting to delineate the scope of Section 5, referred to that provision as broadly "suspend[ing] new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment" (383 U.S. at 334). More particularly, Mr. Justice Black, who dissented on the issue of the constitutionality of Section 5, stated that under that provision an affected State "can in no way amend its constitution or laws relating to voting without" following the procedures prescribed by the section (383 U.S. at 356). Thus, the only judicial authority regarding the reach of Section 5—apart from the decisions below in the instant cases—supports a broad reading of that section's language.

Appellees raise a series of objections to the applicability of Section 5 to the changes in laws relating to voting involved in the instant cases. They assert that the language of the section indicates that it was intended to relate only to changes directly affecting the casting of individual ballots. As we have shown, however (*supra*, pp. 11–12), Section 5 broadly includes not only "any voting qualification or prerequisite," but also any "standard, practice, or procedure with respect to voting." If appellees' reading of the statutory language is correct, that latter phrase would seem wholly redundant; obviously it should be accorded some meaning and effect.[13] Appellees also point out that Section 5 provides that "no person

[13] Moreover, as noted earlier (*supra*, p. 12), Section 14(c)(1) of the Act defines "voting" as including "all action necessary to make a vote effective in any * * * election, including, but

shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure." They focus on the word "comply" and argue that only changes in laws relating to voter qualifications are susceptible of compliance by a voter. But that is hardly dispositive. The choice of the term "comply with" was obviously suggested by the fact that the provision would reach laws relating to qualifications that were not already condemned as tests or devices. It does not follow that the scope of Section 5 should be cut down because a single phrase was selected which is somewhat inapt with respect to other matters also intended to be covered.

Appellees claim to find supoprt in the legislative history for their view that Section 5 is of limited scope. Apart from a single comment by then Assistant Attorney General Marshall, however, the congressional hearings and debates point the other way. The remark of the Assistant Attorney General occurred during the House hearings, and was to the effect that "[t]he problem that the bill was aimed at was the problem of registration" (*House Hearings,* p. 74). The comment was given in response to a question from Representative Corman regarding "whether or not the bill ought to address itself to the qualifications for running for public office as well as the problem of registration" (*ibid.*). In the first instance, it is hazard-

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not limited to * * * casting a ballot, and having such ballot counted" (42 U.S.C. 1973*l*(c)(1)). And Section 5 itself speaks not only of "denying" the right to vote on account of race or color, but also, in parallel terms, of "abridging" that right.

ous to attempt to accord controlling significance to a single comment by one individual regarding the intended scope of a statutory provision, particularly where, as here, the voluminous hearings and debates contain no other similar remarks. Moreover, considering the context in which the statement was made, it appears rather ambiguous. It is not clear that Representative Corman was discussing Section 5 at all in asking the question, and it is conceivable that the Assistant Attorney General's attention was accordingly not focused on that provision when he gave his answer. Similarly, the phrase "qualifications for running for public office" is hardly a precise one, and conjures up a variety of considerations, some of which may be substantially unrelated to a practice or procedure relating to voting. In short, the Assistant Attorney General's comment, while appearing to look towards ~~respondents'~~ appellees' position, is at least partially explicable by the circumstances in which it was made, and cannot in any event be given decisive weight in the face of the other indications of a broader congressional purpose.

Finally, appellees rely on the fact that in apportionment litigation relating to affected States no mention whatever has been made of Section 5. This resulted, they assert, because no one contemplated that that provision had anything to do with methods for selecting candidates for public office and for choosing officeholders. Perhaps there has been a general unawareness of the potential relevance of Section 5 to apportionment matters. But governmental and judicial silence in this regard in the past should hardly

be held to preclude an assertion by appellants here of their statutory right not to have their right to vote denied or abridged without compliance with the approval procedure prescribed by Section 5. Nor can the Attorney General's failure to act under Section 12 of the Act in cases involving reapportionment and redistricting be properly viewed as undermining these Section 5 cases or refuting the clear congressional intent that that provision should be given broad scope. The most that can be assumed from past silence is that the Attorney General was not prepared to interpose an objection to the changes being effected, and thus declined to seek to compel a State or political subdivision to comply with what would have in all likelihood been a wholly formalistic step that would merely have delayed final implementation of a constitutionally required restructuring of government.

In any event, there is no need here for the Court to reach the question whether Section 5 extends to the typical sort of apportionment litigation and districting changes which have followed in the wake of this Court's decisions in *Baker* v. *Carr*, 369 U.S. 186, *Wesberry* v. *Sanders*, 376 U.S. 1, and *Reynolds* v. *Sims*, 377 U.S. 533, and which will predictably ensue in light of the recent holding in *Avery* v. *Midland County*, No. 39, this Term (decided April 1, 1968). Virtually all changes in apportionment and districting arrangements in the States covered by the Voting Rights Act have been accomplished under the aegis and supervision of federal courts, and not by the States alone. Judicial approval of revised plans has been given or withheld, depending on whether the re-

vised arrangement comports with the requirements of the Equal Protection Clause as delineated in this Court's landmark decisions. All such changes were directed toward achieving fairer representation for all citizens and insuring that all voters, however situated, cast an equally weighted vote. It is thus rather unlikely that any such changes would have a potentially detrimental effect on the right of newly enfranchised Negroes to vote in the affected States; rather, they would in all probability serve to assist in the effectuation of Fifteenth Amendment rights (see *Reynolds* v. *Sims*, 377 U.S. at 568).[14] Moreover, none of the instant cases involve the typical sort of apportionment or districting questions presented in the cases to which respondents make reference. This is so even in No. 1058, which involves a change in Section 2870 of the Mississippi Code to permit the election of members of county boards of supervisors at large rather than from districts, while retaining the previous election districts as residence districts. Some question may of course be raised about the constitutional validity of such a scheme, even in light of this Court's decision in *Dusch* v. *Davis*, 387 U.S. 112, on Fourteenth Amendment grounds. Nonetheless, the case does not fit into the ordinary pattern of apportion-

[14] Where, however, a revised apportionment plan has involved Fifteenth Amendment problems, the federal courts have not been reluctant to perceive such difficulties and to hold such a plan invalid on that ground. *E.g.*, *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala.); cf. *Smith* v. *Paris*, 257 F. Supp. 901 (M.D. Ala.); *Gomillion* v. *Lightfoot*, 364 U.S. 339; compare, however, *Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss.), affirmed *per curiam*, 386 U.S. 483.

ment and districting litigation, and thus a holding that Section 5 is applicable in these circumstances would not be tantamount to concluding that the prescribed approval procedure relates to all changes in the affected States relating to apportionment and districting of governmental bodies.

We conclude, then, that the Mississippi statutes involved in these cases are embraced by Section 5. As we have said, the critical question at this juncture is not whether the statutes have the purpose or effect of denying or abridging the right to vote on account of race, but whether they affect voting at all. To us, that seems clear. By changing the law to allow counties in the State to elect boards of supervisors at large rather than by individual districts (No. 1058), Mississippi has plainly affected the voting strength of those who reside in individual districts.[16] By removing the office of county superintendent of education from the roster of elected officials in 11 designated counties, Mississippi has withdrawn an entire area of local govern-

[16] Moreover, resort to this device permits the perpetuation of the previous scheme of unequally populated districts for the election of county supervisors—through use of the residence district technique—and is thus at least questionable in light of this Court's recent decision in *Avery* v. *Midland County*, No. 39, this Term (decided April 1, 1968), which held the equal-population principle of *Reynolds* v. *Sims* applicable to local governmental bodies. Compare, however, *Dusch* v. *Davis*, 387 U.S. 112; but see the extended discussion of that decision in the government's *amicus* brief in *Avery* (pp. 32–40). In light of *Avery*, where the Court made only passing reference to *Dusch*, it at least remains open whether that case states a broad principle applicable in the rather different circumstances presented in No. 1058. In any event, the challenge here is one grounded on the Fifteenth Amendment and the Voting Rights Act which is directed toward the effective implementation of that constitutional provision.

ment from the reach of the elective process.[16] And by prescribing novel conditions for independent candidates for public office in Mississippi, it has restricted the range of choice available to Mississippi voters. In all these respects, the State has attempted to implement "standards", "prerequisites", "practices", or "procedures" affecting voting which differ from those prevailing on November 1, 1964. Section 5 thus applies and requires judicial or executive approval before these changes can be made effective. Such an expansive reading of Section 5, it should be noted, was recently given strong support by the Civil Rights Commission (see *Civil Rights Commission Report*, p. 184).

It remains only to note that compliance with Section 5 in these cases is not an empty ritual performed merely for the sake of conforming to correct procedure. While the determination whether these statutes abridge Fifteenth Amendment rights must await their submission to the proper forum, the prospect of an adverse finding is not fanciful. It is not irrelevant that Mississippi is a State with a history of voter discrimination based on race (see *United States* v. *Mississippi*, 380 U.S. 128), where at the time the Voting Rights Act was enacted only 6.4 percent of the

[16] Nothing in this Court's decision in *Sailors* v. *Board of Education*, 387 U.S. 105, precludes a determination that a change from election to appointment of a local governmental official is without the scope of Section 5. All that the Court there held was that the equal-population principle of *Reynolds* v. *Sims* had no application to the appointment of a school board exercising essentially administrative functions. *Sailors* was solely a Fourteenth Amendment case; the claim here is grounded on the Fifteenth Amendment and the federal statute which seeks to foster its effective implementation. See *Civil Rights Commission Report*, pp. 42–43.

non-white voting age population was registered to vote, by far the lowest figure of any of the affected States (*House Hearings,* p. 32), and that today very substantial numbers of Mississippi Negroes are registered.[17] Against this background, the new laws may well be shown to have a discriminatory purpose or effect. Thus, the statute in No. 1174 makes independent candidacy more difficult, thereby possibly restricting Negro candidacies and limiting the available choices of Negro voters. The statute in No. 1059 might well have the effect of denying to Negro voters, who constitute a majority in 9 of the 11 affected counties, (J.S. 42–45), the option of electing as county superintendent of education a person of their choice. Finally, by authorizing the elimination of district-based voting for county boards of supervisors, the statute in No. 1058 may well insure that the white voters in certain counties will retain full control over all members of the local governing body.[18]

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[17] Recent estimated figures indicate that approximately 235,000 non-white voters have been registered in Mississippi since the enactment of the Act, and that the State now has almost 264,000 non-white voters as compared with only 28,500 prior to passage of the Act. See *Civil Rights Commission Report*, p. 13.

[18] Only in regard to the statute involved in No. 1058 do appellees ~~respondents~~ seek to offer any explanation as to underlying purpose, and their explanation—that the change was necessary to comply with this Court's decisions in reapportionment cases—is a weak and unpersuasive one. It is true that several district court decisions in Mississippi held the equal-population principle of *Reynolds* v. *Sims* applicable to county boards of supervisors (*Damon* v. *Lauderdale County Election Comm'rs* (S.D. Miss.), No. 1197, decided March 30, 1966; *Martinolich* v. *Dean*, 256 F. Supp. 612 (S.D. Miss.)). But not until this Court's recent decision in *Avery* v. *Midland County* was it clear that *Reynolds* applied at the local governmental level. And neither the *Damon* nor *Martinolich* decisions purported to sanction the change adopted; indeed, in the latter case the court expressly

Whether the statutes here involved are ultimately found violative of the Fifteenth Amendment or not, Section 5 will have fulfilled its intended function in the overall pattern of the Voting Rights Act by insuring that careful scrutiny which the Act requires to safeguard the basic right to vote from all possible attempts at evasion or circumvention by the affected States.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted.

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MAY 1968.

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noted that it was not passing on the constitutional validity of the revised scheme authorized by the new Mississippi statute (256 F. Supp. at 616). Moreover, even if some of the impetus for the statutory amendment came from the desire to adjust to this Court's reapportionment holdings, that hardly precludes the possibility of another, less admirable purpose—rendering the votes of newly enfranchised Negroes ineffective in electing supervisors in a county with an overall white voting majority but with Negro voting majorities, at least potentially, in one or more election districts, if equally populated. In short, in no way can the possible presence of the former objective render Section 5 inapplicable, in light of the potential existence of the latter purpose. See *Civil Rights Commission Report*, pp. 22–23.

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Supreme Court of the United States

October Term, 1968

No. [redacted] 3

RICHARD ALLEN, ET AL.,
Appellant,

v.

STATE BOARD OF ELECTIONS, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

RESPONSE OF APPELLEES TO THE MEMORANDUM FOR THE UNITED STATES

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In The

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October Term, 1967

No. 661

RICHARD ALLEN, ET AL.,

Appellant,

v.

STATE BOARD OF ELECTIONS, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

RESPONSE OF APPELLEES TO THE MEMORANDUM FOR THE UNITED STATES

On February 14, 1968, the Solicitor General filed a memorandum expressing the views of the United States in the case at bar. The following day counsel for the parties were informed by letter of the Clerk of this Court that they would be permitted to file supplemental briefs on or before March 5, 1968. In accordance with the leave thus granted, this response of the appellees to the memorandum of the United States is filed.

As previously pointed out by appellees in their motion to affirm the judgment of the District Court, the Virginia State Board of Elections issued certain instructions to

election officials throughout the State on August 12, 1965 and October 15, 1965. The first instructions were promulgated within a week of the effective date (August 6, 1965) of the Voting Rights Act of 1965, and the second instructions were issued some three weeks before the first general election held in Virginia after the effective date of the Voting Rights Act. In effect, these instructions advised Virginia election officials (1) that the Voting Rights Act of 1965 *had become* effective in Virginia on August 6, 1965, and was "*now* in force in Virginia" and (2) that under the provisions of the Federal law, they were required to render assistance to educationally handicapped citizens who were unable to register or to vote because of a lack of literacy or otherwise. Emphasis supplied. See, Statement of Appellees Opposing Jurisdiction and Motion to Affirm, pp. 4-5. Essentially, the instructions in question advised such election officials that various provisions of Virginia law governing registration and voting had *already* been suspended by the Voting Rights Act and that they were *immediately* required to render assistance to prospective voters who were educationally handicapped.

The Solicitor General asserts that instructions of this character, particularly those issued on October 15, 1965, constitute a "practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and states that it "would appear to follow that the new requirement could not be used without first passing the scrutiny of either the Attorney General or the United States District Court for the District of Columbia." See, Memorandum for the United States, pp. 6-7. The latter statement is referable to that portion of Section 5 of the Voting Rights Act which suspends the efficacy of any State voting regulation promulgated after November 1,

1964, unless there has been (1) submission of the rule to the Attorney General, in which case it may be used if no objection is interposed within sixty days; or (2) a declaratory judgment from the United States District Court for the District of Columbia that the rule "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . ." See, Memorandum for the United States, p. 6.

Counsel for appellees submit that the invalidity of the Solicitor General's position is easily demonstrable. If the instructions issued in the case at bar were subject to the provisions of Section 5 of the Voting Rights Act, it necessarily follows that a State to which the Act applies could not adjust its procedures to comply with the requirements of the Federal law until they received permission to do so from the Attorney General or the District Court for the District of Columbia. The Solicitor General's assertion overlooks the fact that the instructions under consideration were not promulgated to alter Virginia law as such, but were required to implement the Voting Rights Act which became effective on August 6, 1965. The Solicitor General's contention impels the conclusion that the Voting Rights Act, which became law on August 6, 1965, could not be made effective in practice without the prior consent of the Attorney General or the District Court. Such a conclusion is tantamount to the proposition that the Voting Rights Act could be suspended until the Attorney General or the District Court approved of a State's instructions complying with the Act. Counsel for appellees submit that there is nothing in the Federal statute which even remotely evidences an intention on the part of the Congress to delay the effectiveness of the Voting Rights Act until such permission is first obtained.

No one can say how many illiterate voters were registered pursuant to the instructions of the State Board of Elections within the first sixty days of the enactment of the Voting Rights Act—persons who could not properly have been registered during this period if the position of the Solicitor General is sound. Similarly, there is no way to ascertain how many illiterate voters were assisted in casting their ballots at the general election in November of 1965, pursuant to the instructions in question—voters who could not have been thus assisted had it been necessary to await the expiration of a sixty-day period following issuance of the instruction on October 15, 1965.

Moreover, the Solicitor General suggests that the Court remand this case to the District Court with instructions "to grant such relief as is necessary to guarantee that Virginia will refrain from imposing restrictions upon the manner of casting write-in votes pending compliance" with the requirements of Section 5. This suggestion is obviously an attempt to convert the instant case into litigation of the character instituted by the United States in Alabama, Louisiana, Mississippi and South Carolina, as mentioned in the Solicitor General's memorandum. See, Memorandum for the United States, p. 6, fn. 3. Such a suggestion surely undertakes to obscure the fact that no case warranting equitable relief has been made out in the instant litigation. As the District Court pointed out on two separate occasions in its opinion, no evidence was presented that Virginia's prohibition of stickers or pasters had been administered in a discriminatory manner and no evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he was entitled. See, Jurisdictional Statement, Appendix, pp. 5a-7a. Indeed, even the Solicitor General admits that Virginia's procedure for cast-

ing write-in votes by illiterates, on its face, has no purpose forbidden by the Voting Rights Act and that the Attorney General does not now have evidence that such a purpose existed. See, Memorandum for the United States, pp. 7-8. Thus, the suggestion that the case be remanded to the District Court is manifestly an effort to subject to the jurisdiction of a Federal court Virginia election officials against whom no suggestion of impropriety has been made.

The only relief sought by plaintiffs in the case at bar is that they be permitted to vote by means of stickers or pasters. As the District Court held, neither the plaintiffs nor any other Virginia citizen is accorded that right, either by the Fourteenth Amendment or by the Voting Rights Act of 1965. The instant case is not now—and never was—a suit to obtain relief from alleged discriminatory registration or voting practices of Virginia election officials, and counsel for appellees submit that the Solicitor General cannot now convert it into such a suit at the ultimate level of appellate review.

For the foregoing reasons, counsel for appellees submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for appellees in the above-captioned matter, hereby certify that copies of this Response of Appellees to the Motion for the United States have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 5th day of March, 1968, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Jack Greenberg, Esq., and James M. Nabrit, III, Esq., 10 Columbus Circle, New York, New York 10019, and Oliver W. Hill, Esq., S. W. Tucker, Esq., Henry L. Marsh, III, Esq., and Harold M. Marsh, Esq., 214 East Clay Street, Richmond, Virginia 23219, counsel for appellants.

.....

Assistant Attorney General

EME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

Office-Supreme Court, U.S.
FILED
JUN 3 1968
JOHN F. DAVIS, CLERK

No. [redacted]25

J. C. FAIRLEY, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1058

J. C. FAIRLEY, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Introductory Statement

The Solicitor General, at the invitation of the Court, filed on May 16, 1968, a Memorandum for the United

States as Amicus Curiae in the above styled cases; and, because the Clerk felt it only fair that counsel should be afforded an opportunity to file a response to this Memorandum, the Appellees respectfully respond; but, in making this response it is earnestly urged, in the event the Court does not summarily dismiss the appeals or summarily affirm the Judgments of the District Court as moved for in Appellees' Motion to Dismiss or Affirm, but entertains the questions in these cases upon their merits, that ample opportunity be afforded the Appellees to appear before the Court and orally argue these causes after having had opportunity to thoroughly brief the issues on the merits.

Jurisdictional Problem

We do not differ from the conclusion reached by the United States as to the threshold question of whether three-judge courts were properly convened so that direct appeals lie to this Court, but do not necessarily agree with the argument urged by the United States to reach this conclusion. The United States took note that "until the matter was noticed here in the order requesting the views of the Solicitor General in Nos. 1058 and 1059, no one appears to have doubted the appropriateness of convening a court of three judges." (Memorandum for the United States, page 5). This jurisdictional question has constantly confronted the Appellees and was raised in the Trial Court by Appellees' Motions to Dismiss, but though raised was not pressed for reasons sufficient unto themselves, the elapsed time period in securing a final decision by this Court being not the least thereof. Moreover, the Appellees were and are cognizant of the jurisdiction of this Court to determine certain issues and to make such corrective Orders as may be appropriate even in the event that the matter

was not one to be heard by a three-judge court. *Bailey* v. *Patterson*, 369 U.S. 31, 34. Thus, since the Plaintiffs had established the battle ground, and the District Judge to whom the matter was assigned had certified the necessity for the convening of such a Court, and the Chief Judge of the Circuit had unquestionably accepted the certification and appointed the additional Judges, the Defendants were of the opinion that in opposing the convening of a three-judge court no useful purpose would be served.

We agree with the United States that authority, if it exists, for convening the three-judge courts in these actions must be conferred by Section 5 of the Voting Rights Act of 1965. The question of the convening of three-judge courts in these actions outside the authority conferred, if such authority is conferred, by the Voting Rights Act is foreclosed by this Court's decision in *Swift and Company* v. *Wickham*, 382 U.S. 111.

We admit that to reach the stated conclusion the Court must place a somewhat strained interpretation on the phrase, "[A]ny action under this section." A literal reading of this phrase would tend to suggest an interpretation that the referred to "[A]ny action" is directed only to suits expressly authorized by the section. Weight is added to such an interpretation rather than against it by the statement in the Memorandum for the United States at Page 22 that "the Attorney General's failure to act *under Section 12* of the Act in cases. . . ." (Emphasis Added) The import of this statement is that the United States is admitting that any action taken by the Attorney General to enforce the proscription in Section 5 of the Act would be *under Section 12* of the Act and not under *Section 5*.

Further, the Memorandum for the United States adds confusion to this jurisdictional problem rather than clarity

when at Page 15 of said Memorandum the United States says:

> "[R]ather than attempting to spell out which kinds of procedures and practices were intended to be covered, Congress spoke in general terms, leaving it to the District of Columbia court or the Attorney General to make the determination as to which side of the line a particular procedure or practice fell."

Even in light of the above quoted statement which asserts that the decision as to which kinds of procedures and practices are covered by the Act rests entirely and exclusively with and in the District of Columbia Court or the Attorney General, the United States also asserts that said decision rests with and in the three-judge courts convened in these cases. This again is an inconsistency in the argument of the United States addressed to the jurisdictional problem.

We also submit to the Court that the consideration suggested by the United States in its Memorandum at Page 10 that the convening of a three-judge court is more appropriate "when the claim being made by a private party is that a state statute of general applicability should be enjoined because the state has not followed the procedures prescribed by federal law. . . ." is not consistent with the rationale of *Swift and Company* v. *Wickham*, supra.

Suggestion of Mootness

Section 5 of the Voting Rights Act of 1965 provides: "[T]hat such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, or procedure has been submitted by the Chief Legal Officer or other appropriate official of such state, or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . ."

It will be noted that while neither the State of Mississippi, Forrest County nor Adams County has submitted to the Attorney General of the United States Section 2870, Mississippi Code, as Amended in the 1966 Legislative Regular Session, and/or the actions taken under said Section by Adams and Forrest Counties, such submission has been made by the Order of this Court of March 11, 1968, inviting the position of the United States as to this matter. To this date, being more than sixty days from said submission, the Attorney General has not interposed any objection to said Section and/or said actions thereunder. Even though the United States accepted the invitation to file a Memorandum, which Memorandum was filed more than sixty days after this Court's Order of March 11, 1968, it still did not interpose an objection. In that particular, the situation in these cases is in nowise different from the situation which existed wherein the altered Voting Laws of South Carolina were approved by the Attorney General although never submitted by the State of South Carolina for jurisdictional review in the District Court for the District of Columbia nor to the Attorney General for his scrutiny. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 320.

The United States in its Memorandum at Page 15 states that:

> "[S]ince Section 5's approval procedure was designed to serve an informing function—to provide 'a method of bringing to the attention of the Government changes in state law' (Assistant Attorney General Marshall's House Hearings, Page 72), . . ."

The import of this interpretation of Section 5's approval procedure, placed upon it by the United States, is that when the Attorney General is "informed" of a change in state voting laws that the method by which he is "informed" is of no consequence and the sixty day period in which

he may object to the change as provided for in said Section commences to run upon his being so "informed." We suggest to the Court that the Attorney General received the information regarding said Section 2870 of the Mississippi Code and the actions taken under said Section by Adams and Forrest Counties in the same and like manner, i.e., a proceeding in this Court, as he received the information regarding the change or changes in the Voting Laws of South Carolina which he affirmatively approved in *South Carolina* v. *Katzenbach*, supra. We suggest that his failure to object in these cases is tantamount to his affirmative action in *South Carolina* v. *Katzenbach*. Therefore, Appellees and this Court must "assume[d] from past silence [is] that the Attorney General was not prepared to interpose an objection to the changes being effected, and thus declined to seek to compel a State or political subdivision to comply with what would have in all likelihood been a wholly formalistic step that would merely have delayed final implementation of a constitutionally required restructing of government." (Memorandum for United States, Page 22)

We reiterate that the Attorney General has not to this date interposed an objection even though he was afforded an opportunity by this Court to so do.

Nowhere in the Memorandum of the United States is an objection registered to Section 2870, Mississippi Code and/or the actions taken thereunder. In fact, the United States affirmatively asserts that:

> "[O]ur (The United States') submission (of this memorandum), of course, does not reach the ultimate issue of the validity of the challenged State laws; . . ." (Memorandum for the United States, Page 11).

We hasten to acknowledge that the United States continues by asserting that the question of validity would have to

be "resolved by the District Court for the District of Columbia if the Attorney General, upon investigation, *shall determine to interpose objection.*" (Memorandum for the United States, Page 11) (Emphasis added) But we suggest that any objections, if such should materialize, must be interposed as the basis for an independent suit by the United States to enjoin the operation and enforcement of Section 2870 of the Mississippi Code and/or actions taken under and by virtue of said section (see *United States* v. *Mississippi,* 380 U.S. 128) since the sixty day period which in the Attorney General (United States) could have interposed an objection under and by virtue of Section 5 of the Act has elapsed. We submit that the apparent attempt by the Attorney General (United States) to extend its right (conferred by Section 5) to interpose objections beyond the sixty day period provided for in the said section must fail when viewed in light of the obvious purpose and reason for inserting this period of limitation upon the exercise of said right. Obviously, Congress was of the mind that this "uncommon exercise of congressional power"; except under exceptional circumstances "not appropriate" legislation; which reposes in the Attorney General of the United States veto power over certain legislative acts of sovereign states must be exercised, if exercised at all, with diligence and dispatch. Congress by inserting the sixty day period of limitation admonished the Attorney General that not only could he not sleep on this "uncommon" right but that he could not even "doze" thereon. This obvious purpose and reason for the limitation comports with congressional concern for the exercise by Congress of its authority in this permissible but "decisive" manner.

This suggestion of mootness is advanced only on the assumption, arguendo, that Section 2870, Mississippi Code, and the actions taken thereunder by Adams and Forrest Counties come within the purview of the Voting Rights Act of 1965, which assumption is emphatically denied.

Private Suits Are Not Authorized to Enforce Section 5 of the Voting Rights Act of 1965

The United States in Footnote 7 of its Memorandum raises and at the same time attempts to resolve the question whether these Appellants had the right to institute these actions to enforce the proscription contained in Section 5 of the Act. We agree with the United States that the question is present, but disagree that it is resolved in favor of the right of Appellants to bring these actions but submit that it is resolved against such right. This is a jurisdictional question which was raised and urged by Appellees in the trial court by their Motions to Dismiss for Lack of Jurisdiction but because of the disposition by that Court in *Bunton, et al.* v. *Joe T. Patterson, et al.*, No. 1059, which disposition was made immediately prior to the argument in *Fairley* v. *Patterson*, No. 1058 (these cases) said question was not pressed. Further, said jurisdictional question, though not argued in Appellees' Motion to Dismiss or Affirm filed in this Court, was presented by Appellees moving this Court to dismiss the appeal. If Appellees had based their Motion solely on the ground that no substantial question on the merits had been raised or presented the Motion would have been only a motion for summary affirmance but since Appellees were aware of the jurisdictional questions involved in these cases, they moved the Court for a *dismissal* or in the *alternative* a *summary affirmance of the Judgments.*

We suggest to the Court that the question of whether these Appellants have a right to bring these actions as private citizens is a more serious jurisdictional question than the jurisdictional question posed by the convening of the three-judge courts. As readily admitted by the United States, since it could do no less, the "Voting Rights Act itself does not expressly provide for private

suits to enforce Section 5 . . ." (Memorandum for The United States, Footnote 7.) The United States then attempts to resolve this question of jurisdiction by merely stating that it "would *seem* to be conferred on the District Courts by 28 U.S.C. 1343 (4)." (Emphasis added) (Footnote 7) This indecisive statement, lacking all legal support, does not square with the position previously taken by the United States in its Memorandum that these actions were brought under and by virtue of Section 5 of the Act. It appears that the United States is attempting to have its cake and eat it too. We submit that the United States has decided in advance where it wants to go and in its Memorandum is making a futile attempt to get there.

As we read the Voting Rights Act of 1965, and particularly Section 5, thereof, it confers no rights upon any private citizens, but is merely a remedial statute by which the right to vote guaranteed by the Fifteenth Amendment to the Constitution of the United States will be vindicated.

The United States contends that Section 5 of the Act "explicitly confers upon individual citizens a *right* . . ." (Emphasis added) (Memorandum for the United States, Footnote 7) This contention finds no support in *South Carolina* v. *Katzenbach*, 383 U.S. 301, but is, in fact, refuted by the Opinion therein. This Court said at page 308 that: "[T]he Act creates stringent new remedies . . ." and addressing itself specifically to Section 5 remarked that "Section 5 prescribes a second *remedy* . . .' (Emphasis added) (383 U.S. at page 316)

Further, while focusing on Section 5 of the Act, the section which the United States points to as conferring a *right*, this Court opined that "[A]n appropriate *remedy* is a judicial determination that continued suspension of the new rule is unnecessary to *vindicate rights guaranteed by*

the Fifteenth Amendment." (Emphasis added) (383 U.S. 335)

Dispositive of the question whether this Act creates certain new voting *rights* or only secures and protects existing voting rights guaranteed by the Fifteenth Amendment to the Constitution of the United States is the language of this Court that:

> "South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the Courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.' By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for *implementing the rights created in § 1.* 'It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.' Ex parte Virginia, 100 U.S. 339, 345, 25 L. Ed. 676, 679. Accordingly, in addition to the courts, Congress has full *remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.*" (Emphasis added except "enforce") *South Carolina* v. *Katzenbach,* 383 U.S. 301, 325, 326.

A reading of the Act reveals that the enforcement, thereof, is exclusively in the Attorney General of the United States. This is confirmed by this Court's comment that:

> "[A]fter enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, *with authority in the Attorney General to employ them effectively.*" (Emphasis added) *South Carolina* v. *Katzenbach,* 383 U.S. 301, 337.

It is inconceivable that the Congress of the United States intended to place in the hands of any and all private citizens authority to enforce Section 5 of the Voting Rights Act. As announced by this Court in discussing said Section 5 of the Act in *South Carolina* v. *Katzenbach*, supra, 334:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellees fail to comprehend how it could be seriously contended that the enforcement of such an "uncommon exercise of congressional power" and "extraordinary power to veto" in the Attorney General would be exposed to the whim of any disgruntled private citizen.

Further, this Court continuing to allude to Section 5 of the Act, stated at page 335 that:

> "[A] state or political subdivision wishing to make use of a recent amendment to its voting laws therefore, has a concrete and immediate 'controversy' *with the federal government.*" (Emphasis added)

This Court did not hold, at any place in its Opinion that authority was in private citizens to "employ" the "array of potent weapons" contained in the Act or that the enforcement of any voting laws created a "controversy" between a State or political subdivision thereof and a private citizen or citizens.

Assuming, arguendo, that the statute and actions taken by the Appellee counties thereunder, presently before this Court, come within the purview of the Voting Rights Act of 1965, these actions could have been mooted at any time by the State of Mississippi, or Adams County,

or Forrest County, submitting said statute and actions thereunder to the Attorney General of the United States and he approving same. The Appellants in these actions would have had no standing in any Court to object to the action of either the Appellees, the State of Mississippi, or the Attorney General. It is difficult to conceive of a right of action which can so readily be extinguished without the approval of the party or parties in which the right allegedly exists.

It is apparent throughout the Act and as stated by the United States in its Memorandum that the only purpose for this proviso in Section 5 of the Act is to inform the Attorney General of any new voting laws to be enforced in a State covered by the Act. It was never intended as a proviso to inform private citizens of such actions taken by a State and never intended to vest any right or authority in any private citizen. The only remedy conferred upon a private citizen by the Act is found in Section 5 thereof which, as the United States points out in its Memorandum at page 8, is to not be "denied the right to vote for failure to *comply* with such" new voting laws. (Emphasis added) This position comports with the position Appellees took in their Motion to Dismiss or Affirm filed in this Court.

We suggest to the Court that Congress intended, as this Court has stated, to "marshal an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." We submit that Congress, realizing that the enactment of Section 5 of the Act was an "uncommon exercise of congressional power", was insistent that any confrontation with a sovereign state or political subdivision thereof be with the United States only. For the good order of the Republic, Congress could have done no less. It is almost ludicrous to even suggest that the Congress of the United States would demean a great

and sovereign state to a position whereby a private citizen could veto a statute enacted by such state and enjoin the operation of same without the necessity of first alleging and proving that the statute is unconstitutional.

This Court, in discussing said Section 5 in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335, declared that "[T]he Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension . . ." We suggest that this is a clear indication by this Court that such enforcing mechanisms are confined within the four corners of the Act. A search within these confines fails to discover any authority, express or implied, for a private citizen to institute an action to enforce the proscription contained in Section 5 of the Act.

Reply to the Discussion of the United States of Section 5 of the Act

The United States, at page 12 of its Memorandum, confesses that the instant actions do not involve statutory changes which, in so many words, alter the existing rules governing the casting of individual ballots. But the United States contends that Section 2870 of the Mississippi Code and the actions taken thereunder by Adams and Forrest Counties come within the ambit of Section 5 because they substantially change the constituency of the members of the Boards of Supervisors of said counties. We suggest to the Court that the Voting Rights Act of 1965 was never intended by Congress to deal with a change in the constituency of any elected official. Such is covered and controlled by the Fourteenth Amendment to the Constitution of the United States and not the Fifteenth Amendment which Amendment was the basis for the enactment of the said Voting Rights Act. As was stated in Appellees' Motion to Dismiss or Affirm, if this position, now advanced by the United States, is approved by this Court, such would

seriously impede, if not prevent, the implementation of the "one man, one vote" rule announced by this Court in *Reynolds* v. *Sims*, 377 U.S. 533, and amplified in *Avery* v. *Midland County, Texas*, 88 S. Ct. 1114, 36 L.W. 4257. This tragic result is forewarned by the statement of the United States in its Memorandum at page 21 that, "[P]erhaps there has been a general unawareness of the potential relevance of Section 5 to apportionment matters."

In any and all changes in apportionment and districting arrangements, there is inherently a change in the constituency of certain elected officials and in most cases, there is a substantial change. In fact and in truth, the purpose of reapportioning and redistricting is to bring about a change in the constituency of elected officials and such is the command of this Court's decisions in *Reynolds* v. *Sims*, supra and *Avery* v. *Midland County, Texas*, supra.

For years, Mississippi and several other Southern States have been accused, falsely, but nevertheless still accused, of "foot dragging" in the field of individual rights and of employing "obstructionist tactics" in the Courts of Law of these United States. *South Carolina* v. *Katzenbach*, supra. Many times, these accusations have flowed from the fountainhead of the United States. Now, for the first time, the United States has accused the State of Mississippi and two political subdivisions thereof, of moving too fast in the field of individual rights. From a reading of Footnote 18, page 26 of the Memorandum for the United States, Appellees gleam that Mississippi and the Counties of Adams and Forrest are being verbally chastised by the United States or by the writer of the Memorandum for anticipating what this Court enunciated in *Avery* v. *Midland County, Texas*, supra. Since the United States has attempted in said footnote to debase the noble purpose of the Legislature of Mississippi in enacting Section 2870 of the Mississippi Code, and the Counties of Adams and Forrest in taking actions

thereunder we feel constrained to point out to the Court several matters which the Court can judicially notice. *On April 11, 1966,* United States District Judge Harold Cox, in *T. L. Crosby, et al.,* v. *Pearl River County Board of Supervisors, et al.,* C.A. No. 3165, enjoined Pearl River County, Mississippi to redistrict said County within ninety days. Being aware of the Order of that Court which, reflected that the United States District Court for the Southern District of Mississippi was of the opinion that the command of *Reynolds* v. *Sims,* 377 U.S. 533, encompassed County level governmental bodies, the Legislature of the State of Mississippi enacted Section 2870 of the Mississippi Code effective *May 27, 1966.* Said Section provided for the redistricting of a county on a population basis or, in the alternative, to elect the supervisors of said districts at large with residential restrictions as approved by the rationale of *Fortson* v. *Dorsey,* 379 U.S. 433. This alternative method was specifically approved as satisfying the requirements of the constitution by this Court in *Dusch* v. *Davis,* 387 U.S. 112.

On *July 27, 1966,* a Three-Judge Court in the Southern District of Mississippi held that the "one person, one vote" rule applies to apportionment of county supervisors' districts in Mississippi. *Martinolich* v. *Dean,* 256 F. Supp. 612.

Although it is the only purpose of this Court to consider the legal question raised in these actions, the Solicitor General of the United States, in his Memorandum, predicates his argument on factual suppositions which, by virtue of the stipulations filed in this cause, have no place. And although these appellees regard allegations of fact and suppositions of fact as being violative of the most basic procedure of appellate practice, nevertheless, appellees are constrained to refer the Court to several factual matters which they submit this Court may judicially notice.

Most indicative of the intent and purpose of the two governing bodies is found in the resolution of Adams County adopted under and by virtue of Section 2870 of the Mississippi Code, a copy of which resolution is attached for the Court as appendix to this Response. It is elementary in local government that a governing body can speak only through its minutes and the resolutions and orders spread therein and that the same are a matter of public record. Specific reference is here made to the following quoted provision of said resolution:

> "WHEREAS, due to the geographical location of the said City of Natchez, it is extremely difficult and highly impractical to divide the county into five supervisors' districts with due regard to equality of population and convenience of situation for election of the members of the Board of Supervisors; and
>
> "WHEREAS, the Board of Supervisors is aware of the 'one man, one vote' decisions of the courts and is desirous of taking action to the end that the vote of each qualified elector shall have the same weight and effect in the election of all members of the Board of Supervisors."

In support of the action of Adams County Board of Supervisors, appellees refer this Court to the following population figures taken from the United States Department of Commerce, Bureau of the Census, Population 1960 of Mississippi, General Population Characteristics, an official government document and entitled to be judicially noticed by this Court:

Supervisor's District	Population
1	14,092
2	1,313
3	1,458
4	15,840
5	5,027

The Board of Supervisors of Adams County, authorized by the Legislature of Mississippi to correct the inequality of the voting strength of citizens from the various districts, resolved so as to entitle each citizen to cast an equally weighted vote. The intent and purpose of the Resolution and Order adopted *October 19, 1966,* cannot be impugned by mere supposition.

As to Forrest County, the same publication sets forth the following population figures by supervisors' districts.

Supervisor's District	Population
1	23,349
2	7,384
3	18,147
4	1,812
5	2,030

Mississippi and two of her political subdivisions cannot be rightfully accused of being in the posture of anticipating decisions of this Court and then reacting thereto in a manner to defeat or at least to impede the will of this Court. In fact, the actions taken by the Appellees attest to an opposite stance. Appellees, once made aware of their constitutional duties, responsibilities and obligations in the area of apportionment and districting moved with admirable speed to conform with the dictates of this Court and those of the District Court for the Southern District of Mississippi. Appellees, in duty bound, responded to the trumpets of these courts and did not wait for the crack of the whip. The actions taken by the Appellees are deserving of admiration not admonishment; of commendation not condemnation; of extolment not reprobation. It would have served the purpose of these United States far better if the United States had heralded the actions of these Appellees and heaped upon them the deserving praise for voluntarily recognizing their obligation to the

people and voluntarily carrying out the command of that obligation rather than heap criticism upon them.

Appellees will make no effort in this response to discuss the legislative history which appears in the Memorandum submitted by the United States other than to state that it is our position that the legislative history as fully developed in Appellees' Motion to Dismiss or Affirm supports the contention of Appellees and the holding of the District Court that Section 2870 of the Mississippi Code and the actions taken thereunder by Adams and Forrest Counties do not come within the purview of Section 5 of the Voting Rights Act of 1965.

Appellees invite the Court's attention to the fact that the United States admits and confesses in its Memorandum that the use of the term "comply with" by Congress in Section 5 of the Act restricts the scope of Section 5 if the said "comply with" is given its literal and true meaning. But the United States hastens to state that the term "comply with" is somewhat "inapt." We point out to the Court that the term "comply with" is also used in Section 4(a) of the Act. The Voting Rights Act of 1965 was prepared and written under the auspices of the Attorney General of the United States and was thoroughly discussed in both the Senate and House Hearings. Further, it is common knowledge that said Act and every word contained therein was scrutinized by both the proponents and opponents of said Act. And in its final form each and every word therein reached the dignity of "words of art." For the Office of the Attorney General to at this late date characterize the use of the term "comply with" as being "inapt" is a transparent attempt on its part to include in Section 5 of the Act matters never intended by the Congress of the United States to be covered thereby and in so doing increase the power of the Attorney General.

We also invite the Court's attention to the statement appearing in the Memorandum for the United States at pages 20 and 21 thereof that:

> "[I]n the first instance, it is hazardous to attempt to accord controlling significance to a single comment by *one individual* regarding the intended scope of a statutory provision, . . ." (Emphasis added)

This "one individual" who is referred to by the United States was none other than Assistant Attorney General Burke Marshall, in all likelihood the main architect of the Act. Again the United States attempts to "confess error" in order to gain in the long haul. The United States appears to be taking the position that "two wrongs make more rights."

We are at a loss to understand the position taken by the United States in its Memorandum that the method of electing members of a legislative body at large with certain residential restrictions may still be open to a constitutional attack on its face. This Court held in *Dusch* v. *Davis*, 387 U.S. 112, that such a method met with all the requirements of the Constitution of the United States. This holding was reaffirmed in *Avery* v. *Midland County, Texas*, 88 S. Ct. 1114, 36 L.W. 4257. In *Avery*, this Court stated that:

> "[T]he Sailors and Dusch cases demonstrate that the constitution and this Court are not roadblocks in the path of intervention, experience and development among units of local government."

This Court had already stated:

> "that in Dusch v. Davis, 387 U.S. 112 (1967), the court permitted Virginia Beach to choose its legislative body by a scheme that included at large voting for candidates some of whom had to be residents of particular districts, even though the residence districts varied widely in population."

We acknowledge, as we did in our Motion to Dismiss or Affirm filed in this Court, that these Appellants, irrespective of what this Court holds in these actions would in nowise be precluded "from filing an action in the United States District Court for the Southern District of Mississippi and asserting therein, invidious discrimination." (page 23, Appellees' Motion to Dismiss or Affirm)

We cannot agree with the position of the United States that "a holding [by this Court] that Section 5 is applicable in these circumstances would not be tantamount to concluding that the prescribed approval procedure relates to all changes in the affected states relating to apportionment and districting of governmental bodies." (Memorandum for United States, page 24) We suggest that such a holding would be tantamount to such a conclusion and submit that this is consistent with that portion of the Memorandum for the United States wherein at page 13 it is stated that laws which substantially change the constituency of certain elected officials affect the electoral process and thereby is within the purview of Section 5 of the Act. Again, we say that any and all changes relating to apportionment and districting of governmental bodies has to bring about a change in the constituency of elected officials being the sole purpose of making such change.

The United States at page 14 of its Memorandum advances the proposition that: "the language of Section 5 and this Court's reference to that provision in its Opinion in *South Carolina* v. *Katzenbach* strongly supports the view that the section should not be read grudgingly." We suggest that the language of Section 5 and this Court's Opinion in reference thereto clearly indicates to the contrary. As heretofore pointed out in this response this Court emphasized that the enactment of Section 5 was "an uncommon exercise of congressional power" and absent the ex-

ceptional conditions found by Congress to exist would have been an inappropriate legislative measure. Such findings by this Court dictate, in fact demand, that said Section 5 be read grudgingly. Bearing in mind the tremendous impact that a holding by this Court that Section 2870 Mississippi Code and the actions taken thereunder come within the purview of the Act will have on the implementation of this Court's rule of one-man, one-vote and having been put on notice by the United States that "there has been a general unawareness of the potential relevance of Section 5 to apportionment matters" this Court is compelled to dismiss the appeals or summarily affirm the judgments for to do less will be to break faith with the millions of people this Court so recently emancipated from the bound of malapportioned legislative bodies.

It would be a cruel congressional hoax if an act of Congress passed for the noble purpose of obliterating once and for all the last remaining vestige of slavery in the field of voting would halt the freeing of millions of other Americans from a different type of slavery in the same field. These troubled times cry out for an interpretation, by this Court, of Section 5 which will synthesize with the one-man, one-vote principle announced by the Court in *Reynolds* v. *Sims*, 377 U.S. 533.

The United States attempts to allay all fears that a holding by this Court that Section 5 is a "broad prophylactic measure" will amount to placing a roadblock in the path of changes in apportionment and districting arrangements by asserting that most of such changes "have been accomplished under the aegis and supervision of federal courts, and not by the States alone." (Memorandum for the

United States, page 22) This reassuring statement by the United States loses its quieting and calming effect when one realizes that the changes now before this Court were not accomplished under "supervision of federal courts" but "by the state[s] alone." Such changes may qualify as "under the aegis of federal courts" if this phrase includes the commands of this Court.

We suggest to the Court that this is a fallacious argument and does not square with the language of the Act or with the earlier position taken by the United States. If any provision of the Act is without doubt it is that provision which requires that any new changes of voting laws enacted by a state or political subidivision thereof, objected to by the Attorney General of the United States, must gain approval of the District Court for the District of Columbia before they may be enforced. This, simply stated, means that if this Court holds, as urged by the United States, that Section 2870 of the Mississippi Code and the actions taken thereunder by the Counties of Adams and Forrest come within the purview of the Voting Rights Act of 1965, then Congress has withdrawn from local courts the authority to pass upon new changes in the apportionment and districting arrangements in States covered by the Voting Rights Act of 1965.

The authority to approve new changes in voting laws enacted in States covered by the Act rests exclusively in the District of Columbia and no other court has such authority no matter how the new laws may have come before that court.

It does not take much imagination to conceive of a situation wherein a recalcitrant malapportioned legislative body could refuse to change its apportionment arrange-

ment and jurisdiction to entertain a suit to force such change would be in the District Court of the District of Columbia. But under and by virtue of the Act only the offending state has the right to institute such action. We are left with an intolerable situation whereby an offending state or political subdivision thereof can refuse to institute suit to gain approval of a change in its apportionment or districting arrangement therefore the state or political subdivision cannot enforce a new change which is exactly the very posture they want to remain in.

It is a touch of irony that the position of Appellees before this Court can be summarized with the language found in the Memorandum for the United States at page 23 thereof. "All such changes were directed toward achieving fairer representation for all citizens and insuring that all voters, however situated, cast an equally weighted vote. It is thus rather unlikely that any such changes would have a potentially detrimental effect on the right of newly enfranchised Negroes to vote in the affected States; rather, they would in all probability serve to assist in the effectuation of Fifteenth Amendment rights."

Conclusion

We submit to the Court that the Memorandum for the United States does not disturb the position taken by these Appellees in their Motion to Dismiss or Affirm, but in certain instances adds support to that position. Therefore, the Motion of Appellees to Dismiss the Appeals should be

sustained, or alternatively, the Judgments of the District Court be affirmed.

Respectfully submitted,

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APPENDIX

WHEREAS, the City of Natchez (being the only municipality in Adams County, Mississippi, and the county seat thereof) is situated in the extreme west portion of said county and bounded on the west by the Mississippi River; and

WHEREAS, a large majority of the qualified electors of said county reside within the corporate limits of the said City of Natchez; and

WHEREAS, due to the geographical location of the said City of Natchez, it is extremely difficult and highly impractical to divide the county into five Supervisor's districts with due regard to equality of population and convenience of situation for election of the members of the Board of Supervisors; and

WHEREAS, the Board of Supervisors is aware of the "one man-one vote" decisions of the courts and is desirous of taking action to the end that the vote of each qualified elector shall have the same weight and effect in the election of all members of the Board of Supervisors:

NOW, THEREFORE, BE IT ORDERED by the Board of Supervisors of Adams County, Mississippi, in regular meeting assembled, as follows:

(1) That all of the qualified electors of Adams County, Mississippi, shall be eligible to vote for each member of the Board of Supervisors of Adams County, Mississippi.

(2) That each candidate shall be a resident of the district which he proposes to represent.

(3) That the Chancery Clerk publish this order in The Natchez Democrat, a newspaper having a general cir-

culation in Adams County, Mississippi, at least twelve (12) months prior to the next general election wherein said Supervisors are elected, the final publication to be on November 5, 1966.

(4) That if twenty per cent (20%) of the qualified electors of the county shall present the Board of Supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the Board of Supervisors will call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the Board of Supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter all elections for members of the Boards of Supervisors shall so be held. If not, members of the Boards of Supervisors shall continue to be elected by the electorate of their respective districts.

ADOPTED AND ORDERED this 19th day of October, 1966.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 3

RICHARD ALLEN, *et al.*,

Appellants,

v.

STATE BOARD OF ELECTIONS, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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BRIEF FOR APPELLANTS

Opinion Below

The opinion of the District Court for the Eastern District of Virginia is reported at 268 F. Supp. 218. Copies of the Opinion and Judgment of the District Court are printed in the Appendix pp. 67a-73a.

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of the District Court was invoked under 28 U.S.C. §§1331, 1343, 2201 to enforce rights protected by the equal protection clause of the Fourteenth Amendment and the Voting Rights Act of 1965 (42 U.S.C. §§1973, *et seq.*). The complaint sought to restrain the Virginia State Board of Elections and other election officials from enforcing a state statute, Va. Code §24-252, insofar as it authorized the officials not to count write-in

votes unless they were inserted on the ballot in the voters' own handwriting. A statutory three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284 (A. 30).

A final judgment of the court below denying injunctive relief and dismissing the case was entered May 2, 1967 (A. 73). Timely notice of appeal to this Court was filed in the court below on June 29, 1967 (28 U.S.C. §2101(b)) (A. 74-76). The District Court, by order dated August 24, 1967, extended the time for docketing the appeal in this Court to September 28, 1967 (A. 78).

This court postponed jurisdiction by order dated June 10, 1968. Appellants' argument in support of the Court's jurisdiction is set forth as Argument I, *infra*, p. 23, *et seq.*

Constitutional and Statutory Provisions Involved

1. This case involves the validity of Code of Virginia, 1950, §24-252 (Code of Va. 1964 Repl. Vol. 5, p. 271), which provides as follows:

> §24-252. *Insertion of names on ballots.*—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) mark or a line (−) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of §24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person. (Code 1919, §162; 1936, p. 278; 1952, c. 581; 1962, c. 536.)

2. The following additional provisions are material to an understanding of the issues presented:

(a) Code of Virginia, §24-251:

§24-251. *Judges or others to assist certain voters.*—Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may, if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months. (Code 1919, §166; 1946, p. 316; 1950, p. 230.)

(b) Constitution of Virginia, §§27, 28:

"§27. *Method of Voting.*—All elections by the people shall be by ballot; * * *

"The ballot box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed or counted, in secret.

So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained."

"§28. *Ballots.*—The General Assembly shall provide for ballots without any distinguishing mark or symbol, for the use in all State, county, city and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candidates and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another."

(c) Constitution of the United States, Art. I, Section 4, Clause 1:

SECTION 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

(d) Constitution of the United States, Art. I, Section 2, Clause 1:

SECTION 2. Clause 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

(e) Title 2, U.S.C., §9:

§9. *Voting for Representatives.*—All votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been

duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect. (R. S. §27; Feb. 14, 1899, c. 154, 30 Stat. 836.)

(f) Title 42, U.S.C., §1973b(a), (b), (c):

§1973b. Suspension of the use of tests or devices in determining eligibility to vote—Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this sub-

chapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or

that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Definition of test or device

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(g) Title 42, U.S.C., §1973c:

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgment of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification,

prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub.L. 89-110, §5, Aug. 6, 1965, 79 Stat. 439.

(h) Title 42, U.S.C., §1973*l*(c)(1):

Definitions

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this sub-chapter, or other action required by law prerequisite to voting, casting a ballot, and having such

ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(i) Title 42, U.S.C., §1973i(a):

§1973i. Prohibited acts—Failure or refusal to permit casting or tabulation of vote

(a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(j) Title 28, U.S.C., §2281.

§2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Questions Presented

I. Whether the Court has jurisdiction of this direct appeal under 28 U.S.C. §1253 because the suit was one required to be heard by a district court of three judges by:

(a) 28 U.S.C. §2281, in that the case presents a substantial question as to the unconstitutionality of Virginia Code §24-252 under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States; or

(b) Subsection 4(a) of the Voting Rights Act of 1965 (42 U.S.C. §1973b(a)) in that this suit to enforce the subsection's ban on the use of tests or devices to deny appellants' right to have their votes counted was thus an action "pursuant to" the subsection so as to invoke its requirement of a court of three judges and its provision for a direct appeal to this Court.

II. Whether Virginia Code §24-252, as written and as administered denies equal protection of the laws to illiterates with respect to write-in voting in violation of the Fourteenth Amendment to the Constitution of the United States, where:

(a) the illiterates are qualified registered voters;

(b) relevant law purportedly guarantees "absolute secrecy" of the ballot and the right to cast write-in votes;

(c) Section 24-252 as written requires write-in votes in the voter's own handwriting and thus forbids illiterates to cast such votes;

(d) Section 24-252 is administratively interpreted and applied to require illiterates to cast write-in votes only in the handwriting of a state election judge; and

(e) Virginia law makes a crazy quilt of unreasoned distinctions so that significantly more favorable procedures to preserve secrecy of the ballot are available

for blind persons, other handicapped persons, and literate persons, than are available for illiterates.

III. Whether Virginia Code §24-252 has been enforced so as to void appellants' write-in votes in violation of the Voting Rights Act of 1965, in that:

(a) Section 24-252 is a suspended "test or device" which was used to deny appellants' right to have their votes counted in violation of Section 4(a) of the Voting Rights Act, 42 U.S.C. §1973b(a);

(b) the Election Board continues to apply the suspended handwriting requirement of §24-252 in conjunction with a new administrative interpretation requiring illiterates to insert write-in votes in the handwriting of a state election judge;

(c) the newly adopted prerequisite or procedure for voting has no legal effect because it may not be used to deny the right to vote since it has not first been submitted and approved administratively or judicially as required by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

Statement of the Case

This litigation involves the claim of certain illiterate registered voters mainly Negroes, who were made newly eligible to vote because of the provisions of the Voting Rights Act of 1965, that Virginia election law unlawfully discriminated against them. They object to the lack of any procedures for protecting the privacy and secrecy of illiterates' write-in votes from disclosure to state officials.

The issues arose in the context of a general election for members of the House of Representatives which was held

November 8, 1966, in Virginia's Fourth Congressional District. Rep. Watkins M. Abbitt, the incumbent, and Edward J. Silverman were the candidates listed on the ballot. The plaintiff-appellants were supporters of S. W. Tucker, a well-known Negro civil rights attorney in Virginia who was a write-in candidate for Congress. The plaintiffs, as the court below found, were "unable to spell accurately or to write legibly" (268 F. Supp. at 219 (1967)). They sought to vote for S. W. Tucker by pasting a small gummed paper strip or sticker (Pl's Exhibit 1, R. 60), upon which his name was printed, on the official ballot under the names of the listed candidates, and then making the appropriate marking preceding his name (A. 11a-28a). The defendant election officials did not count the votes for Tucker on ballots marked with the Tucker stickers. They disallowed the ballots, relying on Virginia Code section 24-252, which permits the insertion of names on general election ballots in the voter's "own handwriting," and further provides that ballots with a name placed thereon "in violation" of the section shall not be counted for such person. According to the statement published by the defendant Board of Elections, the 1966 congressional election was won by Rep. Abbitt with 45,226 votes; Mr. Silverman drew 14,827 votes, and 7,907 write-in votes were counted (R. 61, Pl's Exhibit No. 2, p. 9).[1]

This action was commenced November 28, 1966, shortly after the election. Plaintiffs prayed in their complaint, *inter alia,* for a judgment declaring Virginia Code section 24-252 invalid and in conflict with the equal protection clause of the Fourteenth Amendment and also the Voting Rights Act of 1965, insofar as the Virginia law "purports to deny any voter, solely because of his inability to write,

[1] Citations to "R." refer to the Record of original papers on file in this Court.

the privilege of casting a secret ballot for a person whose name is not printed on the official ballots and having such ballot counted in the appropriate returns; . . . " (A. 9a-10a); and prayed that the court enjoin defendants from failing and refusing to count votes inserted on official ballots "by means other than handwriting" in the November 1966 election, and such votes "hereafter given" in future elections (A. 10a). By their subsequent motion for summary judgment which asked for relief under prayers B (1) and (3) of the complaint, appellants indicated that they mainly sought relief for future elections and not for the 1966 election (A. 66a).

A statutory three-judge district court was convened to hear and determine the case (A. 29a-30a). The plaintiffs submitted requests for admissions under Rule 36, Federal Rules of Civil Procedure (A. 44a-52a), none of which were denied under oath by the defendants (A. 53a-58a). The defendant State Board of Elections had the statutory duty to supervise and coordinate the work of county and city electoral boards to obtain uniformity in their practices and proceedings and to make rules and regulations for their functioning. (Code of Virginia, 1950, §24-25.) The other defendants were judges of election and clerks of election in precincts in which the plaintiffs resided. The requests for admissions developed the facts with respect to the use of Tucker stickers by illiterate voters in several areas where paper ballots were used, and that such votes were not counted. The court below treated the facts as undisputed (268 F. Supp. at 219; A. 67a).

In its defense, the State Board of Elections offered in evidence several letters or bulletins which it had distributed to local voting officials during 1965 after passage of the Voting Rights Act. One letter to all voting registrars

advised that Virginia's prior registration procedures could no longer be used, and that if applicants were unable to complete registration forms the registrar should orally examine the applicant and assist him in completing the registration forms (A. 60a-61a). The Voting Rights Act provisions which prompted the above mentioned letter were those which temporarily forbade the use of literacy tests or devices in states to which the Act was made applicable. (42 U.S.C. §1973b(a)). And, of course, the Voting Rights Act, designed to end racial discrimination in voting, was applicable in Virginia.[2]

The State Board of Elections also introduced Defendants Exhibit #4, a bulletin to election judges dated October 15, 1965 (A. 64a-65a). The bulletin was supplied to voting registrars and secretaries of electoral boards for them to distribute to judges of elections (A. 63a). The bulletin (Defendants Exhibit #4, A. 64a-65a) stated:

October 15, 1965

BULLETIN FROM STATE BOARD OF ELECTIONS

TO ALL JUDGES OF ELECTION:

On August 6, 1965, the "Voting Rights Act of 1965" enacted by the Congress of the United States became

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[2] The designation of Virginia under §1973b(b) was published in the Federal Register on August 7, 1965, 30 Fed. Reg. 9897. In describing the history which led to passage of the Act this Court said in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310-311 (1966):

> Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. (Footnotes omitted.)

> effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.
>
> These instructions also apply to precincts in which voting machines are used.

The Board offered no evidence indicating to what extent, if any, the public was advised of the policy set forth in the bulletin to election judges. Neither is there anything in the record indicating whether or not any instructions similar to those stated in the 1965 bulletin were reissued at the time of the 1966 congressional election or whether voters had any way of knowing that election judges were instructed to assist illiterates in completing their ballots. The court below merely found that "The Attorney General of Virginia asserted, and the plaintiffs do not controvert, that these instructions apply while the Voting Rights Act of 1965 is effective in the state." (268 F. Supp. at 221; A. 72a).

The district court denied the relief prayed and dismissed the case. The court rejected appellants' claim of unconstitutional discrimination against illiterates, citing the decision in *Lassiter* v. *Northampton Election Bd.*, 360

U.S. 45 (1959), for the proposition that discrimination between illiterate and literate voters does not violate the Fourteenth Amendment. (268 F. Supp. at 220; A.69a-70a). The court also rejected appellants' argument that Virginia Code section 24-252 was rendered invalid by the Voting Rights Act of 1965. The court held that the Virginia requirement that the write-in candidate's name be inserted in the voter's own handwriting was "not a test or device defined in 42 U.S.C. §1973b(c)." (268 F. Supp. at 221; A. 72a.) The court said that the requirement did not prevent the appellants from registering and voting, and that the Board of Elections' bulletin provided for them to be assisted by election judges in casting ballots.

After the Jurisdictional Statement was filed this Court invited the Solicitor General to file a brief expressing the views of the United States. 389 U.S. 966. The Solicitor General filed a memorandum urging that the case be decided on the basis of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c), and that the District Court should be directed "to grant such relief as is necessary to guarantee that Virginia will refrain from imposing restrictions upon the manner of casting write-in votes pending compliance with that Section." (Memorandum for the United States, p. 9).

Summary of Argument

I.

A. The Court has jurisdiction to decide the case on direct appeal under 28 U.S.C. §1253 in that it is an appeal from denial of a permanent injunction in a case required by 28 U.S.C. §2281 to be heard by a district court of three judges.

A three-judge court was routinely convened, and its propriety was never challenged or questioned below. Appellants seek to enjoin enforcement of a state statute upon the ground of its unconstitutionality. A substantial federal question is presented whether Virginia Code §24-252 violates the Equal Protection Clause of the Fourteenth Amendment (Argument II, *infra*). A three-judge court is required where the constitutional claim is not "wholly insubstantial" or "foreclosed." *Ex Parte Poresky,* 290 U.S. 30, 32 (1933); *Bailey* v. *Patterson,* 369 U.S. 31 (1962); *Schneider* v. *Rusk,* 372 U.S. 224 (1963); *Zemel* v. *Rusk,* 381 U.S. 1 (1965).

The necessity for a three-judge court is not affected by the fact that appellants also urge separate non-constitutional grounds of attack on the Virginia statute based on the Voting Rights Act of 1965. *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U.S. 73 (1960); *Zemel* v. *Rusk,* 381 U.S. 1 (1965); *Flast* v. *Cohen,* —— U.S. ——, 88 S.Ct. 1942 (1968); *Paul* v. *United States,* 371 U.S. 245 (1963); *Brotherhood of Locomotive Engineers* v. *Chicago R. I. & P. R. Co.,* 382 U.S. 423 (1966). The case otherwise meets the requirements of an equitable action and of the three-judge court statute.

B. Although the need for a three-judge court under 28 U.S.C. §2281 is plain, appellants urge another ground for

three-judge court jurisdiction akin to that urged in three Mississippi voting cases now before this Court. Three judges were also required to decide this case because subsection 4(a) of the Voting Rights Act, 42 U.S.C. §1973b(a) is clear in its requirement that a three-judge court decide certain declaratory judgment actions authorized to be brought by the states against the United States to remove themselves from coverage of the Act. This is not such a case but this case is "an action pursuant to" subsection 4(a) and thus comes within the three-judge requirement of the subsection. Pertinent policy considerations support a construction of subsection 4(a) to require a three-judge court to decide cases involving whether a given state law constitutes a "test or device" suspended by subsection 4(a). There is as much need for a three-judge court to decide the question whether a state law initially fits within the "test or device" category, as there is need for such a court to decide whether the time has come for the suspension of tests to be lifted.

II.

Virginia Code §24-252, as written and as administratively interpreted and applied, denies equal protection of the laws to illiterates with respect to write-in voting. Appellants are illiterates who are qualified registered voters. They sought to cast write-in votes by pasting printed stickers bearing their candidates name on the official ballot. Section 24-252 was applied to invalidate the ballots. Virginia's Constitution grants the right to cast write-in votes and the right to "absolute secrecy" of the ballot.

Appellants' equal protection claims involves a fundamental right, and accordingly must be scrutinized with meticulous care. *Harper* v. *Virginia State Board of Elec-*

tions, 383 U.S. 663 (1966); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). The Court below rejected appellants' equal protection argument on the erroneous theory that since *Lassiter* v. *Northhampton Election Board,* 360 U.S. 45 (1959) approved nondiscriminatory literacy tests as constitutional, the Fourteenth Amendment does not bar any discrimination between literates and illiterates. But once the franchise is granted to illiterates, as it has been in Virginia, the State may not draw lines imposing invidious distinctions with respect to the privacy of the ballot box. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1965); *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

The state law on its face imposes an invidious discrimination between literates and illiterates by in effect confining the latter to voting for listed candidates while providing procedures for all others (including the blind and handicapped) to vote for write-in candidates. The state makes no argument that the statute could still be applied as written. By administrative interpretation the state offers illiterates the choice of voting write-in ballots only in the handwriting of a state election judge. This creates subtle, but serious, discriminations relating to the secrecy of the ballot. There is a crazy quilt of discriminatory relations created by the Virginia scheme. Blind voters may vote write-ins in the handwriting of any person of their choice. Other handicapped persons may be aided only by election judges. State criminal sanctions protect secrecy for both blind and other handicapped voters in this process. Illiterate voters are required to vote in the handwriting of an election judge and are not protected by any criminal sanctions applicable to their assistants. There is discrimination between literates and illiterates, between the handicapped and illiterates, and

between the blind and illiterates. Illiterates are the least favored class.

The classifications made are a crazy quilt; they are not reasonable in light of their purpose, but rather arbitrary and invidious. *Carrington* v. *Rash,* 380 U.S. 89 (1965); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Baxstrom* v. *Herold,* 383 U.S. 107 (1966). Appellants made reasonable efforts to solve the problem created for them by the state's patently void statute-as-written when they used stickers imprinted with their candidate's name. The state has thwarted their effort and offered only a scheme of unreasoned distinctions which make the exercise of the franchise significantly more onerous when an illiterate seeks to cast a write-in vote. No defensible state interest is served by Virginia Code §24-252. *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *Baxstrom* v. *Herold,* 383 U.S. 107 (1966).

A secret ballot is very valuable in a free society. In addition to recognition of this in Virginia's Constitution §27, secrecy is protected in Congressional elections by 2 U.S.C. §9, which requires secrecy as a necessary and intended consequence of the requirement that voting be by "ballot." This 1871 enactment was aimed at what its framers called "KuKlux outrages" comparable to those which are the target of the 1965 Voting Rights Act. Political dissidents and those who historically have been denied the franchise, need a secret ballot to support write-in candidates. The United States Civil Rights Commission has recently reported on the myriad problems faced by Negro illiterates seeking to vote and seeking to vote for write-in candidates. U. S. Commission on Civil Rights, *Political Participation* (May 1968). They face a variety of frauds and other problems.

The right of a secret ballot is also connected with the right of privacy of association for the advancement of

political beliefs. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Talley* v. *California*, 362 U.S. 60 (1960); cf. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 665 (1966).

III.

A. Appellants' right to vote was denied in violation of subsection 4(a) of the Voting Rights Act of 1965. They were denied the right to vote, i.e., to have their votes counted, because of failure to comply with Virginia Code §24-252. Subsection 4(a) suspends in Virginia all "tests or devices" as defined in the Act. The handwriting requirement of §24-252 is such a suspended "test or device." The suspension of tests under the Act was not limited to voting registration. Nor was it limited to casting ballots. The Act also protects the right to have a vote counted properly and included in the appropriate totals of votes cast. Thus, Virginia Code §24-252, which is the only legal support for the election officials' refusal to count appellants' votes, was suspended by the Act. Accordingly, the election officials violated subsection 11(a) (42 U.S.C. §1973 i(a)) prohibiting a refusal to count and report the vote of any person otherwise qualified to vote under the Act.

The Election Board continues to apply the suspended handwriting requirement of Virginia Code §24-252 in conjunction with a new administrative interpretation requiring illiterates to insert the names of write-in candidates in the handwriting of a state election judge. The newly adopted procedure affords no relevant defense to appellants' attack on Section 24-252. The subsequent administrative interpretation cannot alter the fact that the law which was used to disallow appellants' votes had been suspended on the date the Voting Rights Act became effective in the state.

B. In any event the Board's defense based upon the newly adopted administrative interpretation and practice must fail because the new rule has no legal effect. Section 5 of the Voting Rights Act (42 U.S.C. §1973(c)) bars the denial of the right to vote based on the Board's new rule since it has not been submitted and approved either by the Attorney General of the United States or by the District Court for the District of Columbia. The Congress intended that Section 5 would be "all-sweeping" and would apply to all kinds of changes of voting laws in covered states. It surely covers the change attempted to be made by Virginia, as the Solicitor General of the United States has urged in this Court.

Appellants differ however from the view, urged by the United States, that it is desirable to decide the case on the basis of Section 5 without considering appellants' other contentions. We believe it inappropriate to leave unsettled the questions relating to protection of the privacy of illiterates' write-in votes, merely on the ground that the State has injected in the case a defense which fails because of Section 5 of the Act. Appellants are entitled to a judgment which affords equal protection in respect to their write-in votes.

ARGUMENT

I.

This Court has Jurisdiction of the Appeal Under 28 U.S.C. §1253 as the Case Was One "Required . . . to Be Heard and Determined by a District Court of Three Judges."

The jurisdiction of this Court to decide this case on direct appeal rests on 28 U.S.C. §1253 in that appellants appeal "from an order . . . denying, after notice and hearing, [a] . . . permanent injunction in [a] civil action . . . required . . . to be heard and determined by a district court of three judges."

A. A Three-Judge District Court Was Required by 28 U.S.C. §2281.

The complaint in this cause asked that a three-judge district court be convened pursuant to 28 U.S.C. §2281 (A. 9a). The resident district judge (now Circuit Judge), Hon. John D. Butzner, formally requested that the Chief Judge of the Circuit designate a three-judge court in accordance with 28 U.S.C. §2284. (A. 29a). Chief Judge Haynsworth promptly named such a court, noting in his order that the action was one "for the stated purpose of enjoining the enforcement of and declaring unconstitutional portions of §24-252, Code of Virginia, 1950, as being in claimed conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the Voting Rights Act of 1955" (A. 30a). The three-judge district court fully considered the case and deciding both the equal protection claim and the statutory claim on the merits against appellants, denied relief and dismissed the case (A. 67a-73a). There was

nothing in the opinion below suggesting that any of the three judges below (all of whom are now judges of the Court of Appeals for the Fourth Circuit) ever questioned the propriety of convening a three-judge court in this case. Nor did the appellees argue in their brief in the court below that the three-judge court was not properly convened.

When a request for a three-judge court is made, the district judge's "inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962). Without question the complaint plainly met the formal jurisdiction requisites. Jurisdiction in the district court was premised on 28 U.S.C. §§1331, 1343, 2201 (A. 4a). Only recently suits based on the same three statutes and filed against the same Virginia State Board of Elections have been reviewed here on direct appeal from three-judge district courts. *Harman* v. *Forssenius,* 380 U.S. 528, 532-533 (1965) (a suit to enforce the 24th Amendment); *Harper* v. *Virginia State Bd. of Elections,* 383 U.S. 663 (1966).

The complaint seeks the injunction of enforcement of a state statute "upon the ground of the unconstitutionality of such statute." 28 U.S.C. §2281. The existence of a substantial question of constitutionality must be determined by the allegations of the Bill of Complaint." *Ex Parte Poresky,* 290 U.S. 30, 32 (1933). A three-judge court is not required by Section 2281 "when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent" *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962); see *Ex Parte Poresky, supra; Turner* v.

Memphis, 369 U.S. 350 (1962); *Swift & Co.* v. *Wickham,* 382 U.S. 111, 115 (1965); *Schneider* v. *Rusk,* 372 U.S. 224 (1963). However, a three-judge court is required to be convened, and a single judge is "powerless to dismiss the action on the merits" (*Schneider* v. *Rusk, supra,* 372 U.S. at 225) unless the constitutional question sought to be presented is so plainly insubstantial that it is "no longer open . . . foreclosed as a litigable issue" (*Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962)), or "prior decisions make frivolous" the claim (Id. at 33), or "the constitutional issue presented is essentially fictitious" (Id. at 33), or it is "obviously without merit" (*Ex Parte Poresky,* 290 U.S. 30, 32), or "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky, supra,* quoting from *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288 (1910).

None of the above quoted characterizations may properly be applied to the equal protection question presented here. On the contrary, petitioners make a substantial claim that Virginia Code §24-252 is inconsistent with the Equal Protection Clause, in that it does not afford illiterates equal protection for the secrecy of their ballots when casting write-in votes. As quite artfully summarized by the Solicitor General:

> "Thereby tendered are such subsidiary issues as whether Virginia may require an illiterate to vote in the handwriting of a state-appointed election judge whose duty of secrecy is not reinforced by the threat of criminal sanctions, while at the same time allowing a literate voter to write his own vote, a physically handicapped voter to be assisted by an election judge who is subjected to criminal penalties if he discloses

the nature of the vote and a blind person to vote in the handwriting of a person of his own choosing."[3]

These are questions of first impression in this Court. But they are quite clearly questions of a federal nature, involving as they do the right to vote, and to have one's vote counted in the election for a member of the House of Representatives. "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U.S. 533, 562 (1964). "Whatever the ultimate holdings on the questions may be . . . [the court should not] dismiss them as insubstantial on their face." *Brotherhood of Locomotive Engineers* v. *Chicago R.I. & P.R.Co.,* 382 U.S. 423, 428 (1966). Indeed, even if the Court does not accept appellants' equal protection argument, at least it is not "so insubstantial as to compel a district court to read it out of the complaint and refuse to convene a three-judge court." *Zemel* v. *Rusk,* 381 U.S. 1, 6 (1965).

Nor is the necessity for a three-judge court affected by the fact that "non-constitutional grounds of attack" are also alleged in the complaint, namely appellants' claim under the Voting Rights Act. The Court held in *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U.S. 73, 85 (1960) that:

> "Where a complaint seeks to enjoin a State statute on substantial grounds of federal unconstitutionality, then even though nonconstitutional grounds of attack are also alleged, we think the case is one that is *required* by . . . Act of Congress to be heard and

[3] *Allen* v. *State Board of Elections,* Oct. Term 1967, No. 661, Memorandum For The United States, p. 4.

determined by a district court of *three judges.*'" 28 U.S.C. §1253 (emphasis is Court's).

The Court has adhered to the view that "a litigant need not abandon his nonconstitutional arguments in order to obtain a three-judge court." *Zemel* v. *Rusk,* 381 U.S. 1, 5-6 (1965); *Flast* v. *Cohen,* —— U.S. ——, 88 S.Ct. 1942, 1947 (1968); *Paul* v. *United States,* 371 U.S. 245, 249-250 (1963); *Brotherhood of Locomotive Engineers* v. *Chicago, R. I. & P. R. Co.,* 382 U.S. 423 (1966); see also *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535 (1954); *Sterling* v. *Constantin,* 287 U.S. 378 (1932). And when the three-judge court is "once convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court." *United States* v. *Georgia Publ. Serv. Comm.,* 371 U.S. 285, 287, 288 (1963).

The case otherwise meets the requirements of the three-judge statute. There is no question of a law only local in character as the law involved here "applies generally" and statewide in Virginia. Contrast *Sailors* v. *Kent Board of Education,* 387 U.S. 105 (1967) with *Moody* v. *Flowers,* 387 U.S. 97 (1967) and *Dusch* v. *Davis,* 387 U.S. 112 (1967). Indeed the case involves a matter of public importance and significance. The United States Civil Rights Commission has reported on the important problem created in various states by refusal to assist or permit various kinds of assistance to illiterate voters. Report of the United States' Commission on Civil Rights, *Political Participation,* pp. 70-74, 111, 128, n. 459 (May 1968). And of course in some areas, including Virginia, where this case arose, write-in candidates for some offices may sometimes win or at least be significant factors in election contests. Write-in candidates are particularly important for political dissidents such as the supporters of S. W. Tucker in

Southside Virginia, who have not been a part of the major political establishment. All too frequently, the problems of race, economic dependency, illiteracy, and lack of political power coincide. The issue whether illiterates' votes shall be kept secret from state officials some of whom have opposed their participation in the electoral process for decades is one of extreme public importance.

B. A Three-Judge District Court Was Required to Be Convened by Subsection 4(a) of the Voting Rights Act of 1965 (42 U.S.C. §1973b(a)), Which Also Provides For a Direct Appeal in This Court.

While we believe that the necessity for a three-judge District Court under 28 U.S.C. §2281 has been sufficiently established for the reasons set forth in Part IA of this argument, *supra,* we also urge that a three-judge court was required by subsection 4(a) of the Voting Rights Act of 1965, 42 U.S.C. §1973b(a), set forth *supra,* pp. 5-6. We think it fit to argue this added ground for a three-judge court even though it was not mentioned in the case heretofore, because the question thereby presented is akin to (though not identical to) a question involved in three Mississippi cases to be argued here this term. See, e.g., Oct. Term 1968, No. 25, *Fairly* v. *Patterson;* No. 26, *Bunton* v. *Patterson;* No. 36, *Whitley* v. *Williams.*[4] Fur-

[4] In the Mississippi cases the contention is made by the United States (in a memorandum submitted last term) that Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c) required three-judge courts. The cases involve whether the phrase in the last sentence of Section 5 "any action under this section" includes only suits instituted by states seeking a declaratory judgment provided for by Section 5 or whether "any action under this section" also includes private suits to vindicate the substantive prohibition of Section 5, i.e., where Section 5 is invoked as a basis for invalidating a state law.

thermore, decision of this question is desirable in order to clarify an important undecided issue under the Voting Rights Act and to facilitate and thereby expedite its enforcement by the lower courts.

Subsection 4(a) of the Voting Rights Act (42 U.S.C. §1973b(a)), provides in part in its second paragraph:

> "An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28

The arguments by appellants in the present suit concerning whether Section 4 required three judges are somewhat like those which the United States has made concerning Section 5. We note that the Memorandum of the United States in the above mentioned cases does distinguish between the language of Section 4(a) ("an action pursuant to this subsection") and that in Section 5 ("any action under this section") and suggests that there is a better case for a more inclusive coverage in the latter usage. But we think, as we urge, *infra*, that there is a reasonable argument on the facts of the present case that Section 4(a) required a court of three judges.

We are doubtful of the direct applicability of the jurisdictional argument made by the United States based on Section 5 to the present case. While we agree with that argument and find it persuasive, the issue about Section 5 in this case arose in a different way than it did in the Mississippi cases. The Mississippi cases were premised on Section 5 from the outset. However, Section 5 was not invoked specifically in the complaint in this case because the appellants attack in the complaint was aimed at action taken by Virginia officials in refusing to count ballots under Va. Code Section 24-252, which was enacted long *before* the Voting Rights Act and thus is not susceptible to attack on the basis of Section 5 which is aimed at post-Nov. 1, 1964 enactments. An issue under Section 5 was first thrust into this case when the state defended by relying on a new administratively adopted practice for assisting illiterates which was offered and accepted by the trial court as justification for the states action in disallowing appellants' ballots. We think it proper for the court to consider the effect of Section 5 upon the state's defense, particularly in view of the insistence of the United States, which is charged with direct responsibility in administering that provision, that it be followed. See Argument III. B., *infra*. But we think it unnecessary to rely on Section 5 to establish the jurisdictional point here.

of the United States Code and any appeal shall lie to the Supreme Court."

The question for decision is whether the present case is "an action *pursuant to*" subsection 4(a) of the Act.

Subsection 4(a), quoted in full *supra* at pp. 5-6, broadly prohibits the denial of the right to vote because of a citizen's failure "to comply with any test or device" (as defined in subsection 4(c), 42 U.S.C. §1973b(c)) in any state covered by the Act. This prohibition is in reality a "suspension" of such tests or devices because under subsection 4(a) it applies "unless" the state has obtained a declaratory judgment against the United States in the District Court for the District of Columbia ruling that no tests or devices have been used for five years to deny the vote on racial grounds.

Plainly then, a suit by a State against the United States seeking the kind of declaratory judgment provided for by subsection 4(a) would be "an action pursuant to" subsection 4(a). This, of course, is not that kind of case, but it is a case in which private parties seek to enforce subsection 4(a) against the prohibitions of a "test or device" used to deny their right to cast an effective ballot (See Argument III.A, *infra*). The statutory issue tendered to and decided by the court below was whether Va. Code §24-252 requiring that a write-in candidate's name be inserted in a voter's handwriting was a "test or device" suspended by the Act. The court below held against appellants' contention and ruled that the requirement "is not a test or device defined in 42 U.S.C. §1973b(c)" (A. 72a). We believe that this suit is thus one "pursuant to" subsection 4(a).

In common acceptance "pursuant" means "Acting or done in consequence or in prosecution (of anything);

hence, agreeable; conformable; following; according; with *to* or *of*." Websters New International Dictionary (2d Ed. 1959). This lawsuit was filed "in consequence of" and "in prosecution of" the provision of subsection 4(a) suspending tests or devices. The suit is precisely designed to give effect to and to be "in prosecution of" the subsection and hence, is, in pursuance of it.

A reading of the phrase "an action pursuant to" which limited its meaning only to cases for the specific kind of declaratory judgment authorized to be brought to remove a state from the effectiveness of the subsection is unnecessarily restrictive. A suit which seeks to enforce the principal substantive provision of the subsection is obviously one "pursuant to" it. A central purpose of Congress in enacting the Voting Rights Act was to enforce the Fifteenth Amendment by removing certain "tests and devices" as obstacles to Negro voting. Whether a given state law establishes a prohibited test or device is obviously of critical importance. The Congress by subsection 4(a) quite plainly intended to provide a three-judge court to determine whether the time had come for states to be removed from the effective prohibitions of the Act. It conforms with that purpose to require a three-judge court also, when in a case such as this, a court must determine whether a particular state law is to be subject to the prohibitions of the Act ever, at any time.

In construing the three-judge requirement of 28 U.S.C. §2281 the Court has pointed out that its significant purposes have been to "provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies" (*Swift & Co.* v. *Wickham*, 382 U.S. 111, 119 (1965)), "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory

scheme . . . by issuance of a broad injunctive order" (*Kennedy* v. *Mendoza-Martinez;* 372 U.S. 144, 154 (1963)), and "to expedite important litigation" (*Swift & Co.* v. *Wickham, supra,* at 124). These same purposes are served by the three-judge requirement of subsection 4(a) of the Voting Rights Act. But the purposes will only be served fully if the statutory phrase "An action pursuant to this subsection" is construed to reach at least those cases in which subsection 4(a) is invoked as the basis for a requested injunction against the enforcement of a state law alleged to be suspended by the subsection as a prohibited "test or device."

In conclusion we point out first, that the decision in *County Board of Elections of Monroe County, N. Y.* v. *United States,* 383 U.S. 575 (1965), does not affect the question involved here. That suit by the United States sought to enforce subsection 4(e) of the Voting Rights Act (42 U.S.C. §1973b(e))[5] which unlike section 4(a) does not contain any provision for a three-judge court. The suit was dismissed under the doctrine of *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), because the only ground urged for jurisdiction was the conflict between federal and state statutes. Second, although the Voting Rights Act does not explicitly authorize private individuals to sue to vindicate rights created by subsection 4(a) not to "be denied the right to vote in any Federal, State, or local election because of . . . failure to comply with any test or device," nevertheless such private suits are plainly authorized by 42 U.S.C. §1983 and 28 U.S.C. §1343(4) authorizing suits "under any Act of Congress providing for the protection of civil rights, including the right to vote." *Gray* v. *Main,* —— F.Supp. —— (not yet reported) (M.D. Ala. No. 2430-

[5] Subsection 4(e) is the provision relating to persons literate in Spanish which was upheld by this Court in *Katzenbach* v. *Morgan,* 384 U.S. 641.

N, March 29, 1968). Third, the provision of the Voting Rights Act of 1965 limiting jurisdiction to the District Court for the District of Columbia (subsection 14(b); 42 U.S.C. §1973*l*(b)) applies only to injunctions against enforcement of the Act and to Declaratory Judgment suits brought by the states to avoid coverage of the Act. Suits to vindicate the Act may be brought by the Attorney General in the "district courts of the United States" (Section 12(f); 42 U.S.C. §1973j(f)), and private suits to enforce the Act are similarly not limited by the provision restricting attacks on the law to the District of Columbia court. *Gray* v. *Main*, —— F.Supp. —— (not yet reported) (M.D. Ala. No. 2430-N, March 29, 1968).

II.

Virginia Code Section 24-252, on Its Face and as Administered Denies Illiterates Equal Protection With Respect to Write-in Voting in Violation of the Fourteenth Amendment to the Constitution of the United States.

Appellants are registered voters in Virginia who desire to vote for write-in candidates in general elections. But they are unable to spell accurately or write legibly (A. 67a), and Virginia has failed to provide means to protect the secrecy of illiterates' write-in votes equal to the means provided for protecting the write-in votes of other classes of voters. The law appellants challenge on equal protection grounds, Section 24-252 of the Code of Virginia, 1950, provides:

> "At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a

check (√) or cross (× or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of §24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

This statutory provision is designed to implement the state constitutional provision allowing voters to cast write-in votes. (Constitution of Virginia, §28, quoted *supra*, at p. 4; ". . . but any voter may erase any name and insert another.")

The requirement that such write-in votes be in the voter's "own handwriting" was added to the law as a 1952 Amendment.[6] The 1952 handwriting amendment to the write-in vote provision was consistent with other provisions of Virginia law imposing handwriting tests for voters, including a constitutional provision[7] and implementing stat-

[6] Virginia Acts 1952, c. 581. The Editorial note to section 24-252 in the Virginia Code 1964 Repl. Vol. 5, p. 271 states: "The 1952 amendment deleted from the first sentence the words 'the name or names of any person or persons' and inserted in lieu thereof the words 'the name of any person in his own handwriting thereon and to vote for such other person.' The amendment also added the proviso and the last sentence."

[7] Constitution of Virginia, section 20, provides in part, as follows:

§20. Who may register.—Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

* * *

Second. That, unless physically unable, he make application to register in his own handwriting, on a form which may be provided by the registration officer, without aid, suggestion, or other memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; and, * * *"

utes[8] stipulating that unless "physically unable to do so" an applicant for voting registration must complete the required form "in his own handwriting."

On August 7, 1965 Virginia became subject to certain provisions of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. §1973 et seq.[9] Under the Act the handwriting tests for voter registration, just mentioned above were suspended, as the State Board of Elections conceded (A. 60a-61a). A question involved in this case and discussed in Argument. III below, is whether this statutory suspension also applied to Virginia Code Section 24-252.

The present controversy about write-in votes arises in the context of Virginia's further reaction to the Voting Rights Act. Appellants sought to cast write-in votes in the 1966 Congressional election[10] for S. W. Tucker, by pasting thin gummed strips of paper or "stickers" upon which his name was printed on to the ballot and then making the appropriate check mark or cross by his name. The appellees refused to count the votes thus attempted to be cast for Tucker. In refusing to count these votes appellees relied upon section 24-252 which states in its last sentence

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[8] See e.g., Virginia Code of 1950, section 24-68, which restates the constitutional requirement quoted in the preceding footnote and provides a statutory form for registration, etc. See also Virginia Code of 1950, section 24-71 providing *inter alia* that while making application to register to vote an applicant "shall not be permitted to refer to any pamphlet, booklet or other memorandum, printed or written, nor to discuss with any person any matter concerning the requirements. . . ."

[9] Virginia was designated under 42 U.S.C. §1973b(b) on August 7, 1965 by appropriate publication in the Federal Register. 30 Fed. Reg. 9897.

[10] Note that the election contest which precipitated this suit occurred in 1966 more than 15 months after enactment of the Voting Rights Act and not in the elections immediately following passage of the Act in 1965.

that ballots with "a name or names placed thereon in violation of this section" shall not be "counted for such person."

The opinion below took note of the provision Virginia has made for assistance to blind and other physically handicapped voters and correctly observed that:

> Section 24-251, Code of Virginia 1950, authorizes a judge of election, upon request, to assist a physically handicapped voter prepare his ballot, and allows a blind voter to be aided by a person of his choice. The assistants are enjoined to secrecy. For any corrupt violation of their duties, they may be punished by confinement in jail for not less than one nor more than twelve months. No provision was made for helping an illiterate person because under Virginia law all voters had to demonstrate ability to read and write. (A. 71a).

The court went on to acknowledge that Virginia had in 1965 directed its registrars to help illiterate persons register to vote after the Voting Rights Act was enacted (A. 71a). The opinion also quoted the text of the election board's October 15, 1965 bulletin (A. 72a) directing judges of election that illiterates who sought aid should be aided in the preparation of their ballots by one of the election judges selected by the voter. Virginia has not enacted any statute since the Voting Rights Act to deal with this subject. The election board's distribution of an internal bulletin to secretaries of electoral boards and judges of elections (A. 63a-64a) thus apparently represents the full extent of the state's attempt to adjust its laws and practices to accommodate the newly enfranchised illiterates in casting their write-in ballots. There was no evidence by the board indicating to what extent, if any the election

officials made known to the community or to individual illiterates either the contents of the October 15, 1965 bulletin, or that assistance was available.

The Court below, construing section 24-252 as a legislative prohibition against the use of stickers,[11] said in its opinion that the propriety of stickers was a matter for "legislative, not judicial determination" (A. 68a). The equal protection attack on §24-252 as an unconstitutional discrimination against illiterates was rejected by the Court below which reasoned that the "*exclusion* of illiterates from voting . . . does not violate the Fourteenth Amendment," in reliance upon this Court's decision in *Lassiter* v. *Northampton Election Board,* 360 U.S. 45 (1959) (A. 69a; emphasis supplied). Thus finding constitutional support for discrimination against illiterates in the *Lassiter* case, *supra,* the Court below held "we conclude that §24-252 does not violate the Fourteenth Amendment by discriminating between literate and illiterate voters" (A. 70a).

By way of further background, we add two observations. First, it is agreed by all the parties to this case that appellants are entitled to vote in their respective counties, notwithstanding their illiteracy. This is, thus, not a controversy involving the state's right to set the qualifications of voters. Cf. *Lassiter* v. *Northampton Election Board,* 360 U.S. 45 (1959). Second, Virginia law recognizes the value of a *secret* ballot; the State Constitution provides that "elections shall be by ballot" and that "the absolute secrecy

[11] Appellants argued below in their brief that the use of stickers was permitted as a matter of Virginia law by virtue of Sections 27 and 28 of the Virginia Constitution guaranteeing a secret ballot and the right to make write-in votes. (R. 73-75). They pointed out that in the 1964 general election Virginia's voters had defeated a proposal designed to add some of the language of section 24-252 including the handwriting clause to the state constitution in lieu of the current provision of Virginia Constitution, Section 28 about write-in votes (R. 74).

of the ballot shall be maintained" (Constitution of Virginia, §27).

With this background, and with the case in this posture, we address the equal protection claim against Code section 24-252.

At the outset we emphasize the fact that appellants' equal protection claim involves the "precious" and "fundamental" (*Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670 (1966)) right to vote. These are "matters close to the core of our constitutional system." *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965). Mr. Chief Justice Warren wrote for the Court that "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964). And so the court has applied strict conceptions of equal protection where voting rights are at stake. As the Court said in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670 (1966):

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully examined. *Skinner* v. *Oklahoma,* 316 U.S. 535, 541; *Reynolds* v. *Sims,* 377 U.S. 533, 561-562; *Carrington* v. *Rash,* 380 U.S. 89; *Baxstrom* v. *Herold,* 383 U.S. 107; *Cox* v. *Louisiana,* 379 U.S. 536, 580-581 (Black J. concurring)."

In *Reynolds v. Sims, supra,* at 561, 562 the court stressed the same theme, stating:

> "Like *Skinner* v. *Oklahoma,* 316 U.S. 535, such a case 'touches a sensitive and important area of human

> rights,' and 'involves one of the basic civil rights of man,' presenting questions of alleged 'invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.' 316 U.S., at 536, 541. Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo* v. *Hopkins,* 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S. at 370."

The references to the Oklahoma compulsory sterilization case, *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) in *Harper* and *Reynolds, supra,* highlight a case where the seriousness of the right involved, and of the injury threatened, weighed heavily in the consideration of the equal protection claim. Voting rights cases present problems of a similar dimension as the court has recognized in *Harper* and *Reynolds, supra.*

As written, §24-252 allows literate persons to cast write-in votes but prohibits such votes by persons unable to insert the candidates' names in their own handwriting. Viewed simply as written, without the gloss of the administrative interpretation placed upon the law by the State Board of Elections in the October 15, 1965 bulletin, the law is, we think, plainly unconstitutional in violation of the equal protection clause. It may well be (as we assume for the purpose of this argument) that under the doctrine of *Lassiter* v. *Northampton Election Board,* 360

U.S. 45 (1959),[12] Virginia formerly could require literacy and a handwriting test such as that in section 24-252 as a prerequisite to casting a valid write-in vote. That circumstance is, we submit, no longer relevant once the state's power to impose a literacy test is removed, as it has been by the Voting Rights Act of 1965, and all voters literate and illiterate are enfranchised. Once illiterates are enfranchised, the state may not invidiously discriminate against them. "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 665 (1966). Compare the analogous problem dealt with in *Rinaldi* v. *Yeager,* 384 U.S. 305, 310 (1966), where the Court said:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin* v. *Illinois,* 351 U.S. 12; *Douglas* v. *California,* 372 U.S. 353; *Lane* v. *Brown,* 372 U.S. 477; *Draper* v. *Washington,* 372 U.S. 487."

No more serious, invidious and irrational discrimination may be postulated than one which allows all literate persons the option to vote either for listed candidates or write-in candidates, but operates to limit illiterates to voting for persons listed on the ballot. This is precisely the discrimination which results from §24-252 as written. Such a rule could serve no legitimate function. No rele-

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[12] But Cf., *Louisiana* v. *United States,* 380 U.S. 145 (1965); *Schnell* v. *Davis,* 336 U.S. 933 (1949), affirming 81 F.Supp. 872 (S.D. Ala. 1949).

vant difference between literates and illiterates supports a rule confining the latter to vote for listed candidates while others, including blind and handicapped persons equally unable to write for themselves (Code §24-251), are permitted to cast write-in ballots.

While the breadth of the language of the court below would lend itself to a reading that any form of voting discrimination in favor of literates and against illiterates is constitutional, we do not understand that the Virginia State Board of Electons now seeks to justify such a proposition. By the October 15, 1965 bulletin the Board partially accommodates to the new situation created by the Voting Rights Act of 1965. However in so doing the Board has created more subtle, but nonetheless, equally serious and invidious forms of discrimination between literates and illiterates. These discriminations, which we analyze in some detail below relate to the secrecy of the ballots of the various classes of persons affected by the statutory scheme.

Section 24-252 as it is administered for illiterates in accordance with the October 15, 1965 bulletin and in conjunction with §24-251 presents a complicated pattern of classifications and relationships. Illiterates who desire to vote for write-in candidates are, as we shall demonstrate, the least favored class. With respect to secrecy of write-in votes these classes appear as follows:

1. Literate voters can still vote write-in ballots and can do so in "absolute secrecy" as guaranteed by Virginia's Constitution, Article 27.

2. Blind voters may vote write-ins, and because they must necessarily sacrifice their secrecy to some extent they are permitted to be aided by any persons they

choose including judges of elections or others. State criminal sanctions are available to punish any such assistant who "corrupt[ly]" violates the command that the voter be assisted "in accordance with his instructions" and that the nature of his vote not be divulged. This enables the blind voter's ballot to be secret against all the world save for the assistant chosen by the voter himself.

3. Physically handicapped voters (other than the blind) may also vote write-ins, but if they require assistance to write on their ballots it must be given by "one of the judges of election designated by" the voter. The judge of election is subject to the same criminal sanctions described above as pertaining to the blind voter's assistant. Thus the physically handicapped are required to disclose their write-in votes to a state official, but are protected by criminal sanctions.

4. Illiterates unable to spell or write legibly because of educational handicaps are permitted (under the election board's bulletin) to vote write-in votes. But the assistance must come from one of the judges of elections selected by the voter. The administrative bulletin, but no state criminal law, directs judges to follow voters' instructions and not divulge their votes (A. 64a). Illiterates must give up their right to "absolute secrecy" to a state election judge who is under no threat of criminal sanctions to follow instructions or preserve secrecy.

As this analysis makes clear, illiterate voters are plainly the least favored class with respect to secrecy of the ballot. This is further emphasized when the groups are analyzed in terms of their opportunity to insure that their

instructions are followed and that the vote is actually cast for the candidate of their choice. Literate and physically handicapped voters have no problem in this regard as they can see and understand how their ballots are marked. An illiterate unable to read must rely on a state official, while a blind person can at least choose a trusted friend in whom to place confidence and responsibility. And the "trusted friend" is subject to criminal sanctions while the illiterate's assistant is not.

Further analysis of the four classes with respect to their need for assistance when they support a listed candidate as against a write-in candidate shows that the regulatory pattern also tends to penalize support of write-in candidates to the extent that it does differentiate between candidates. Thus for literate voters and blind voters the pattern imposes no apparent advantage or disadvantage in voting for a listed or unlisted candidate. Conditions of secrecy or lack of secrecy remain the same in both groups no matter what type of candidate is selected. This is also true with respect to almost all physically handicapped voters as well. (The only exception would be the group of handicapped persons who were physically unable to write a candidate's name, but could make a mark by a listed candidate's name or operate a voting machine without assistance.) For illiterates able to recognize names on a ballot, or able to memorize in advance their place on the ballot or voting machine the system introduces a significant advantage in voting for a listed candidate. Such votes can be cast without surrendering secrecy as must be done if an illiterate votes for a write-in candidate. So in still another dimension the regulatory scheme penalizes the illiterate who seeks to cast a write-in more than it penalizes any other group, and thus penalizes a write-in candidacy.

The question remains whether Virginia has offered any rational justification for this "crazy quilt" [13] of discrimination. It is true that the state has treated all illiterates with an equal hand. "And mere classification, as this Court has often said, does not of itself deprive a group of equal protection." *Carrington* v. *Rash*, 380 U.S. 89, 92 (1965). We must inquire "whether the classifications drawn in a statute are reasonable in light of its purpose . . . whether there is an arbitrary or invidious discrimination. . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964); *Carrington* v. *Rash*, 380 U.S. 89, 93. The distinctions that are drawn must have "some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966); *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966). We examine in turn the discriminations between the illiterate and literate, the illiterate and the blind, and the illiterate and the physically handicapped. We think none of them founded in rationality. Rather the resultant crazy quilt is a capricious remnant of the state's now forbidden policy prohibiting all voting by illiterates.

We think there is no justification for providing the literate voter absolute secrecy, while giving the illiterate voter no protection for the secrecy of his write-in vote save an election board bulletin asking voting judges to respect it. All the more is this true when the secrecy must be surrendered to a state official. The appellants devised a method for completely protecting the secrecy of their ballots. Their entirely reasonable solution to their dilemma, which they face in future contests unless they prevail in this case, was to use voting stickers. The election board

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[13] Cf. *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964) where it was said the reapportionment schemes were "little more than crazy quilts, completely lacking in rationality and could be found invalid on that basis alone." And see Id. at 588 (Mr. Justice Clark, concurring).

had no valid interest in having votes cast in the handwriting of any particular person. Using stickers is a method approved in a number of state courts, without very specific legislative enactments directed to the issue. *Pace* v. *Hickey*, 236 Ark. 792, 370 S.W. 2d 66 (1963); *O'Brien* v. *Election Comm'rs.*, 257 Mass. 332, 153 N.E. 553 (1926); *Dewalt* v. *Bartley*, 146 Pa. 529, 24 Atl. 185 (1892); *State* v. *Anderson*, 191 Wisc. 538, 211 N.W. 938 (1927). Contra see *Fletcher* v. *Wall*, 172 Ill. 426, 50 N.E. 230 (1898), *Blackman* v. *Stone*, 101 F.2d 500, 504 (7th Cir. 1939), and *Morris* v. *Fortson*, 261 F.Supp. 538 (N.D. Ga. 1966). Faced with Virginia's failure to provide for them to cast write-in votes secretly, and indeed with the state legislature's failure to provide for them at all, appellants' use of voting stickers to accurately and consistently indicate the name of their favored candidate was entirely reasonable under the circumstances.

When the discrimination against the illiterate vis-a-vis physically handicapped and blind voters is examined with an eye to rational legislative justification the state scheme really fails. No valid purpose is served by allowing some voters to protect their votes from disclosure to state officials and requiring such disclosures of others. Nor is any legitimate end served by protecting the secrecy of some voters' ballots by criminal sanctions and denying this protection to illiterates. There is "no defensible interest served" (*Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966)) by such "unreasoned distinctions" (Id. at 310) as Virginia has made in this case. It cannot be said that the classification made is "reasonable in light of its purpose" (Cf. *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964)), where the only discernible purpose is to make the exercise of the franchise significantly more onerous when an illiterate seeks to cast a ballot for a write-in candidate. The state may not protect the secret ballot for some and "arbi-

trarily withhold . . . [protection] from some." *Baxstrom* v. *Herold,* 383 U.S. 107, 111 (1966).

The value of a secret ballot, in a free and democratic society is self-evident. Virginia's Constitution pledges "absolute secrecy". The right to a secret ballot also finds support in relevant federal law. Nearly 100 years ago Congress enacted the law which is now codified as 2 U.S.C. §9, quoted supra at p. 4. This law says that votes in Congressional elections "must be by written or printed ballot" and has been construed to require a *secret* ballot. See *Johnson* v. *Clark,* 25 F.Supp. 285 (N.D. Tex. 1938); cf. *Voorhes* v. *Dempsey,* 231 F.Supp. 975 (D.Conn. 1964). When Congress enacted 2 U.S.C. §9, in 1871, it intended to provide a secret ballot as opposed to the *viva voce* method of voting, which was seen as the alternative. During the debates on §9 (this section was originally section 19 of the Act of Feb. 28, 1871, 16 Stat. 440, c.99, §19), Congressman Bingham said: "What objection can there be to the ballot? . . . It occurs to me that there is but a single State in the Union today that tolerates the old method of voting viva voce." Cong. Globe, 41st Cong., 3d Sess. 1284 (1871). The evils Congress was concerned with in 1871 bear a direct relationship to the problems addressed by the Voting Rights Act of 1965 as the debate quoted below indicates.[14]

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[14] The problems confronted by the 41st Congress were reflected in the debate over 2 U.S.C. §9:

> "Sir, we all know that KuKlux outrages have been committed, not only in North Carolina . . . but in other states of the South; and that in more than one city of this Union enormous frauds have been perpetrated upon the ballot-box." Cong. Globe, 41st Cong. 3d Sess. 1275 (1871) (Remarks of Rep. Lawrence).
>
> "Your 'repeaters,' your 'ballot-box stuffers,' your 'KuKlux Klans,' intimidation of loyal citizens—these and numberless other agencies of wrong and fraud on the ballot, overturning

Secrecy was clearly a part of the contemporary 19th century understanding of the word "ballot" as is evidenced by judicial usage. See *In Re Massey*, 45 F. 629, 634-635 (E.D. Ark. 1890):

> That the word "ballot" implies secrecy is unquestioned, and, if it was provided that the election shall be by ballot, and nothing further was said, then it would be without doubt the right of the elector to have the secrecy of the ballot preserved from impertinent or improper inspection. . . .

The right of a secret ballot is of considerable practical moment for political dissidents, such as appellants, who were supporters of a write-in candidate opposing an incumbent who had served ten consecutive terms.[15] In such circumstances the right to keep one's vote secret from a state election judge belonging to the dominant political group is of more than abstract importance. Virginia election judges are appointed by local electoral boards under a statute which directs that representation be given to the two leading political parties in the last election, Va. Code §24-30.

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the power and will of the people, will continue to run riot in the land unless prevented by some such legislation as this. . . . We have seen the electors of States defrauded out of the honest expression of their choice of candidates at the ballot-box, and in others we have seen similar results from terrorism, intimidation and violence." Id. at 1276 (Remarks of Rep. Lawrence).

"The object of the bill is very manifest, and in my judgment just as it is manifest. It is to prevent, under the law and by virtue of the law, any violation of the rights of the citizen by fraud or corruption on the part of any one to whom is intrusted the conduct of the election or the registration of voters." Id. at 1284 (Remarks of Rep. Bingham).

[15] The Hon. Watkins Abbitt, Representative from Virginia's Fourth Congressional District, has served in that office since the 80th Congress.

Illiterates who support unpopular dissident candidates are the ones who will feel the pinch of Virginia's discriminatory denial of a secret ballot. It would take no great courage for an illiterate to seek aid from an election judge to vote in favor of the State's dominant political forces. But it would be another matter entirely when the illiterate supporter of a dissident minority candidate—the black supporter of a civil rights leader like S. W. Tucker for example—arrives at the polls in some areas of Virginia Fourth Congressional District such as Prince Edward County.[16] The Civil Rights Commission has made a finding which demonstrates the scope of the problem still faced by Negro illiterates in areas subject to the Voting Rights Act. The Commission recently reported (U. S. Commission on Civil Rights, *Political Participation*, May 1968, 183-184):

> In some areas, even though Federal observers have been present, local election officials have engaged in various practices resulting in the denial of adequate assistance to Negro illiterates or in the disqualification of their ballots. These practices include (1) failing to inform Negro illiterates of their right to assistance; (2) refusing to assist Negro illiterates; (3) refusing to assist Negroes who can sign their names but are otherwise functionally illiterate; (4) refusing to supply the proper number of voting officials to assist Negro illiterates; (5) humiliating Negro illiterates who need or request assistance; (6) marking the ballots of Negro illiterates contrary to their wishes; (7) permitting Negro illiterates to mismark their own ballots; (8) failing to instruct Negro il-

[16] See *Griffin* v. *School Board*, 377 U.S. 218 (1964) for the story of the extreme local resistance to school desegregation by closing all schools.

literates on the use of voting machines; (9) failing to point out to Negroes disqualifying errors in the marking or casting of their ballots; (10) denying to Negro illiterates the right to use sample ballots where permitted by State law; and (11) denying to Negro illiterates the right to have the assistance of bystanders where permitted by State law.

Nor has the State of Virginia been entirely free of difficulties. In Nansemond County, Virginia, in the 4th Congressional District in July 1967, the Ku Klux Klan conducted a campaign of intimidation and confusion which caused many Negroes to stay away from the polls on primary day. Civil Rights Commission Report, pp. 127-131. The problems caused by economic dependence are considerable.[17] The United States has prosecuted litigation designed to assure assistance to illiterates. *United States* v. *Louisiana,* 265 F.Supp. 703 (E.D. La. 1966), aff'd per curiam 386 U.S. 270 (1967); *United States* v. *Mississippi,* 256 F.Supp. 344 (S.D. Miss. 1966); *United States* v. *Executive Com. of Dem. Party of Greene Co., Ala.,* 254 F.Supp. 543 (N.D. and S.D. Ala. 1966). Private plaintiffs also have been litigating the problems of Negro illiterates in such circumstances. *Gray* v. *Main,* —— F.Supp. —— (not yet reported) (M.D. Ala. No. 2430-N, Mareh 29, 1968).

Moreover, the right to a secret ballot is obviously intimately connected with the right of privacy of association

[17] See also Civil Rights Commission Report at 70-74, 111, 126-127. The Commission noted the problem caused for illiterates by economic dependence at 128, n. 459: "Illiterates must be assisted in casting their votes. In States such as Mississippi, where they may not have the assistance of friends or bystanders, they must be assisted by election officials, who usually (especially in rural areas) are white and are associated with the white political and economic power structure. In these circumstances, Negro illiterates cannot be assured of a secret ballot."

for the advancement of political beliefs, a right plainly protected by the First Amendment. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); *Talley* v. *California,* 362 U.S. 60 (1960); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Bates* v. *Little Rock,* 361 U.S. 516 (1960); *Gibson* v. *Florida Investigation Committee,* 372 U.S. 539 (1963); cf. *Zwickler* v. *Koota,* 389 U.S. 241 (1967). The exact relation between voting and political expression has not yet been canvassed by the Court, *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 665 (1966), but quite plainly the secret ballot is a valuable privilege which cannot be denied or infringed on a discriminatory basis consistent with the Equal Protection Clause. The Virginia discrimination against illiterates serves no overriding governmental purpose which can justify the pattern of differential treatment.

III.

Virginia Code §24-252 Is in Conflict With the Voting Rights Act of 1965.

A. Virginia Code §24-252 Is a Prohibited "Test or Device" Which Was Used to Deny Appellants' Right to Vote in Violation of Section 4 of the Voting Rights Act of 1965 (42 U.S.C. §1973b).

Mr. Chief Justice Warren wrote for the Court in *South Carolina* v. *Katzenbach,* 383 U.S. 301, 308, wherein the Court upheld the constitutionality of the principal portions of the Voting Rights Act, that the law "was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." Among the "stringent new remedies" (Id. at 308) designed by Congress an important feature is subsection 4(a) suspending "literacy tests and similar devices for a period of five years from

the last occurrence of substantial voting discrimination" (Id. at 334).

Appellants invoke subsection 4(a) seeking redress for the refusal of Virginia election officials to count their ballots in 1966 and in future elections. In this case appellants' write-in votes were not counted as votes for S. W. Tucker because Tucker's name was placed on the official ballot by printed stickers rather than in the voters' "own handwriting" as required by Virginia Code §24-252. Under the last sentence of §24-252: "No ballot, with a name . . . placed thereon in violation of this Section, shall be counted. . . ." This action violated the Voting Rights Act of 1965 because the legal effectiveness of §24-252, upon which the election officials relied for their action in disallowing the votes, had been suspended by the federal statute on August 7, 1965.

Subsection 4(a) of the Voting Rights Act of 1965, quoted *supra*, pp. 5-6, provides that ". . . no citizen shall be denied the right to vote in any Federal, State or local election because of his failure to comply with any test or device in any State . . .," which is subject to the Act's coverage formula, with certain exceptions and provisos not material here.

Our inquiry then is to determine whether appellants were "denied the right to vote in [a] . . . Federal . . . election," and, if so, whether that denial was "because of . . . [their] failure to comply with any test or device . . ." If these questions are answered affirmatively (as we urge below) it would follow that appellants were entitled to judicial relief to enforce Section 11(a) of the Voting Rights Act of 1965 (42 U.S.C. §1973i(a), which says:

"No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to

vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote."

The District Court took note of the Election Board's defense based on its October 15, 1965 bulletin (quoted in Statement, *supra,* at 14-15; A. 64a), and rejected appellants' statutory argument by saying:

> "The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. §1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. Under present Virginia statutes and regulations of the Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled." (A. 72a).

We discuss, first, whether the handwriting requirement of §24-252 is a "test or device." We think that it has the attributes described in the statutory definition of "test or device." Voting Rights Act subsection 4(c), 42 U.S.C. §1973b(c) defines "test or device" in part to mean "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, *write,* understand, or interpret *any matter,* (2) demonstrate any educational achievement or his knowledge of any particular subject . . ." (emphasis added). Section 24-252 is such a test because it does make it a prerequisite for voting a valid write-in ballot that the voter demonstrate the ability to write the candidate's name on the official ballot.

It is equally plain that the statute operated so that appellants were "denied the right to vote in [a] . . . Federal . . . election." To be sure appellants were allowed to register, and they were allowed to *attempt* to vote but they were denied the "vote," because as defined in section 14 (c)(1) of the Act, 42 U.S.C. §1973*l*(c)(1), quoted at p. 8, *supra*, the term "vote" includes "having such ballot counted." The 14(c)(1) definition of "vote" and "voting" is framed to "include all actions necessary to make a vote effective . . . including, but *not limited to registration*, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast. . . ." (Id., emphasis added).

Thus, the test suspension was "not limited to registration" of voters, and not even limited to the casting of ballots. The Act also suspended every "test or device" that might prevent a vote from being counted properly and included in the appropriate totals of votes cast. The District Court said that Virginia "did not preclude the plaintiffs from registering or from voting" (A. 72a). This answer is insufficient in a case where their votes were not counted because of a statutory provision admitted to contain a prohibited "test or device." The statutory definition by which "voting" is deemed to include "having a vote counted" is consistent with normal usage and with the usage of this Court over a long period of time. See *United States* v. *Mosely*, 238 U.S. 383 (1915); *United States* v. *Classic*, 313 U.S. 299, 315 (1941). Thus it follows that Section 24-252 was used to deny appellants right to "vote" in violation of the Voting Rights Act.

The Board seeks to avoid the thrust of appellants' argument that the handwriting requirement used to invalidate their ballots is a prohibited test or device under Section

4(a) by pointing to the fact that on October 15, 1965 the Board ordered election judges to aid illiterates. However this argument is unresponsive to the question whether §24-252 was suspended as a matter of law on August 7, 1965 several months before the election board's reaction. If §24-252 was suspended the only statutory basis for disallowing appellant's votes disappears and the command of Voting Rights Act §11(a) that the votes must be counted is controlling. The Board argues the case as if there were some Virginia law other than §24-252 which prohibits the use of stickers. But the only prohibition in Virginia law against stickers is the suspended requirement of §24-252 that ballots must be in the voter's own handwriting.

This controversy involves the "manner of holding elections for Senators and Representatives," a matter which under the Constitution of the United States (Article I, section 4, clause 1) is committed to the ultimate control of the Congress. Congress is fully authorized under the Constitution to "make or alter" rules regarding the manner of conducting a federal election. A federal law intended to be protective of the right to vote in federal elections should be liberally construed as against a state enactment which narrowly and technically restricts the right to cast effective votes. As the whole area of federal election mechanics is committed to Congressional control there is no problem of infringement of States' rights underlying the controversy. Furthermore "the right to vote in federal elections is conferred by Art. I, §2, of the Constitution" *Harper* v. *State Board of Elections*, 383 U.S. 663, 665 (1966); *United States* v. *Classic*, 313 U.S. 299, 314-315 (1941).

The policy against rules which thwart the right to vote on the basis of the technicalities of state law has been stated very plainly by the Congress. The provisions of 42

U.S.C. §1971(a)(2)(B), forbid the denial of the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election.[18] There is no justification, in terms of administrative convenience, for disallowing ballots on such an overly technical ground as that used by appellees. As the Court said a few terms ago in another context involving a threat to the right to vote in *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965):

> We deal here with matters close to the core of our constitutional system. "The right . . . to choose," United States v. Classic, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. Oyama v. California, 332 U.S. 633.

The appellants' use of stickers to indicate their votes was entirely reasonable under the circumstances and the States' invalidation of their ballots was unreasonable. The Voting Rights Act should be construed to block unreasonable measures which disenfranchise voters where it may be reasonably construed to accomplish this end. Appellants faced a dilemma in the 1966 election; they face the same problem in future contests. They desired to vote write-in ballots for S. W. Tucker. They also sought to keep their votes secret. Virginia law, on the face of the statute books, still absolutely forbade them to vote except

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[18] The right to "vote," in that statute also, includes "all action necessary to make a vote effective," including having the ballot "counted and included in the appropriate totals of votes cast." See 42 U.S.C. §1971(a)(3)(A), incorporating the definition in 42 U.S.C. §1971(e).

in their own handwriting. The statutes made no exception for illiterates to be aided even by election judges. An Election Board bulletin directed election judges to aid them on request. But the Election Board had no power to enact any criminal law which might be a deterrent to a voting judge breaching a voter's confidence, and did not purport to do so. Thus, illiterates were not offered the protections which were offered to handicapped and blind voters by Virginia Code section 24-251.[19] Voters who could not read had the problem, which physically handicapped voters did not have, of not having any available means of knowing whether or not the election judge was faithfully carrying out their directions. Blind voters were offered the option of being assisted by a trusted friend; appellants were not given this choice. Voters with physical handicaps other than blindness could observe and comprehend the actions of the election judges who cast their votes. Only illiterate voters were placed entirely at the mercy of election judges who were not even bound by any statute of the state to follow their instructions or keep their confidence.

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[19] The existence of such criminal sanctions was thought by a Virginia court to be essential to the validity of a similar 19th century Virginia law which was challenged because of the threat to the secret ballot. *Pearson* v. *Board of Supervisors of Brunswick County*, 91 Va. 334, 21 S.E. 483 (1895). In *Pearson*, the Court sustained an 1894 Virginia law which included a provision that at the request of an elector physically or educationally unable to vote a special constable could aid him in preparing his ballot. The law was attacked as an infringement of the secret ballot. The Court acknowledged "that very great power is placed in the hands of this special constable, that a great trust is reported in him, and that wherever confidence is given it is liable to be abused" (*Pearson, supra*, 21 S.E. at 485). But, the Court sustained the law relying on the fact that the constables were "under the sanction of an oath" and were subject to "severe penalties" for violating their duties.

B. Section 5 of the Voting Rights Act (42 U.S.C. §1973c) Nullifies the Election Board's New Procedures Which the Board Asserts in Defense of Its Action.

The Board's rebuttal to the appellants' statutory attack on Section 24-252 places heavy reliance on the new procedure reflected in the Board's October 15, 1965 bulletin (A. 63a). The Board argues this case as if this internal agency bulletin were in effect an amendment to Virginia Code Section 24-252, and the Court below seems to have accepted the bulletin more or less on that basis. We have urged above in part III. A., that the bulletin provides no relevant response to the appellants' contention that Section 24-252 has been suspended by the Federal Act, and that it is not in the power of the State to resuscitate it for the time being. Section 5 of the Voting Rights Act provides an equally conclusive surrebuttal to the Board's argument.

Section 5 of the Act (42 U.S.C. §1973c) prevents any new state rule with respect to voting procedures from taking effect in certain states pending appropriate federal administrative and/or judicial review to determine that the new rule does not have a racially discriminatory purpose or effect. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 319-320, 333-334 (1966). In upholding this admittedly "decisive" measure against arguments by the affected states that it was unconstitutional, the Court pointed to the fact that "Congress knew that some of the States covered by §4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). Section 5 was designed to give "further appropriate assurance that 15th Amend-

ment rights will not be denied, either by laws currently in force, or by fertile imaginations." 111 Cong. Rec. 8303, April 22, 1965 (remarks of Senator Hart).

The October 15, 1965 bulletin, and the procedure it announces are ineffective to save Virginia Code §24-252 because the new procedures are still precluded by Section 5 of the Voting Rights Act. Section 5 requires review of any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." Virginia has not submitted its new procedures to the Attorney General for review, or obtained an appropriate declaratory judgment approving these new procedures. Accordingly, under Section 5 "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure."

The Solicitor General has stated for the United States that Virginia has made no attempt to comply with the notice and review procedures of Section 5, and that the United States does not regard the matter as "a purely formalistic rite." (Memorandum for the United States, pp. 6-7). The legislative history of Section 5 makes it clear that the provision was intended to apply to all kinds of changes of a covered state's voting machinery. Its coverage is "all-sweeping" [20] though truly trivial changes would of course obtain the consent of the Attorney General of the United States upon the requisite notice of the change from the State's legal officer. In the House Hearings Attorney General Katzenbach agreed that a variety of hypothetical

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[20] The characterization "all-sweeping" was that of Chairman Celler of the House Judiciary Committee. Attorney General Katzenbach agreed to that characterization of the provision for review of new rules. Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter House Hearings), p. 60.

changes would be subject to the review requirement such as a change of voting age, a change of residence requirements, a change from paper ballots to machines, changes of property requirements, and changes in the dates and hours for registration.[21]

The Board has advanced no adequate explanation for its failure to comply with the requirements of Section 5. The Board's argument that the procedure is too time-consuming is merely an attack on the policy and wisdom of the legislation itself. Disagreement with Section 5 is no excuse for failure to follow its notice procedures.

Appellants urge that the consequence of the application of Section 5 to this case is merely to establish the insufficiency of a ground urged by the Board in reply to Appellants' attack on Code Section 24-252. Appellants do not agree, as urged by the United States last term before the case was set down for argument, that the Court should decide the Section 5 issue, and use it to avoid decision of the appellants' other challenges to Section 24-252. We believe that any resolution of the litigation which leaves it still open to the State to enforce Section 24-252, or to unduly jeopardize the secrecy of illiterate's ballots fails to meet the vital issue properly presented by this litigation. The issues properly presented should not be avoided merely because the State has injected into the case a defense which fails under Section 5 of the Act. Appellants are entitled to obtain equal protection for their secret ballots in the suit they brought for that purpose.

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[21] House Hearings, pp. 60-62.

CONCLUSION

WHEREFORE it is respectfully submitted that the judgment of the Court below should be reversed and the district court directed to grant injunctive and declaratory relief as prayed for in the complaint to invalidate Section 24-252 insofar as it purports to deny any voter, solely because of his inability to write, the privilege of casting a secret ballot for a person whose name is not printed on the official ballots, and to enjoin the appellees from refusing to count votes solely because the name of the candidate was not inserted on the ballot in the handwriting of the voter.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968
NO. 25

J.C.FAIRLEY, et al.,
Appellants,

-vs-

JOE T. PATTERSON, et al.,
Appellees.

LEVI MARSAW, III, et al.,
Appellants,

-vs-

JOE T. PATTERSON, et al.,
Appellees.

On Appeal From a District Court of Three Judges,
United States District Court for the Southern
District of Mississippi.

BRIEF FOR APPELLANTS

OPINIONS BELOW

The order in *Fairley* is reported at 282 F. Supp. 164. The order in *Marsaw* is not reported. The orders are reprinted in appellants' separate appendix (A. 28-29, 80-81).*

* "A" refers to the portions of the record printed as a separate appendix by appellants. Appellants will also refer to an appendix printed in the back of this brief.

JURISDICTION

The District Court entered a judgment in *Marsaw* on October 4, 1967 and in *Fairley* on October 5, 1967. The Notice of Appeal in each case was filed on November 28, 1967.

The jurisdiction of the court below was based on 28 U.S.C. § § 1343(3) and (4), 2201 and 2202 and on 42 U.S.C. § § 1971(d), 1973c(j) and (f). A three-judge district court was required by 42 U.S.C. § 1973c and 28 U.S.C. § 2281.

The Supreme Court has jurisdiction of this direct appeal pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 1253.

STATUTES INVOLVED

The statutes involved are Section 5 of the Voting Rights Act of 1965, 42 U.S.C., § 1973c, Section 14(c)(l), 42 U.S.C. § 1973 1(c)(1), and § 2870 of the Mississippi Code of 1942, prior to its amendment in 1966, and as amended in 1966. These statutes are printed in Appendix A *infra* of appellant's brief.

QUESTIONS PRESENTED

1. Whether the three-judge court below was properly convened pursuant to 42 U.S.C. § 1973c and whether appellants, as private parties, had a right to sue therein.

2. Whether § 2870 of the Mississippi Code, as amended in 1966, allowing Adams and Forrest Counties to switch to at-large elections prior to the November 7, 1967, elections of the members of the Board of Supervisors of those counties, bears a sufficient relationship to "voting" as that term is used within Sections 5 and 14 of the Voting Rights Act of 1965, as to have required the submission of the 1966 amendment to the Attorney General of the United States or the United States District Court for the District of Columbia.

3. Whether, the November 7, 1967, elections for the members of the Board of Supervisors having been held at large pursuant to the 1966 amendment of § 2870 of the Mississippi Code, this Court should direct new elections for the Supervisors in each district of the two counties in accordance with §2870 prior to its amendment.

STATEMENT OF THE CASE

Prior to May 27, 1966, each of the Members of the Board of Supervisors in each of the Counties of Mississippi, including Adams and Forrest Counties (the counties bringing the appeal herein) was elected by the qualified electors from their respective districts pursuant to Section 2870 of the Mississippi Code and Article 6 §170 of the Constitution of Mississippi. (See appendix A attached to this brief for the statute and its later amendment). Effective May 27, 1966, the Legislature of Mississippi amended § 2870 to provide that the Board of Supervisors of any County could adopt an order providing that all of

the members of the County Board of Supervisors be elected at large by all the qualified electors of the County. The Board of Supervisors of Adams and Forrest Counties adopted ordinances providing for elections of the members of their County Supervisors by all the qualified electors of the County (A. 7, 13, 36, 45-46, 50-53). Elections were held on November 7, 1967, in Adams and Forrest Counties in which all the qualified electors of each county were eligible to vote for each member of the Board of Supervisors by County.

The Voting Rights Act of 1965 applies to Mississippi and provides in Section 5, 42 U.S.C. § 1973c that whenever a State or political subdivision thereof:

> "shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964,"

such State or political subdivision cannot enforce or apply such change until it has either (1) instituted an action in the United States District Court for the District of Columbia for a declaratory judgment that

> "such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. § 1973c)

and such judgment has been entered, or (2) submitted the change to the Attorney General of the United States and had no objection interposed by the Attorney General within 60 days after such submission.

Neither the State of Mississippi, nor any of its officials, nor Adams, or Forrest Counties (in which the named appellants reside), nor any of their officials has instituted any action in the United States District Court for the District of Columbia with respect to § 2870 of the Mississippi Code, as amended, nor submitted such amendment to the Attorney General of the United States (A. 8, 14, 38, 47).

Appellants are Negro qualified electors and potential candidates for a position as a member of the Board of Supervisors in Forrest and Adams Counties, Mississippi. They represent a class of persons similarly situated (A. 2, 34). In both suits, appellants seek to have the 1966 amendment to § 2870 of the Mississippi Code declared such a change in "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting," within the purview of Section 5 of the Voting Rights Act of 1965, as to require appellees to comply with Section 5. Appellants also seek injunctive relief, restraining appellees, their agents, employees, successors and persons in concert with them from enforcing, implementing or otherwise giving effect to §2870 of the Mississippi Code, as amended until appellees have complied. At the time of the filing of these suits, prior to the holding of the November 1967 elections, appellants prayed for an order

enjoining the election pursuant to § 2870 as amended in 1966, of members of the Board of Supervisors in their respective counties, and for an order requiring appellees to hold an election pursuant to §2870 as in effect prior to its amendment in 1966, to fill said positions in November 1967 (A. 10-11 40-41). Since the elections held in November 1967 should have been held pursuant to § 2870 as in effect prior to its amendment in 1966 and not pursuant to § 2870 as amended in 1966, appellants now pray for an order setting aside said elections of members of the Adams and Forrest Counties Board of Supervisors and directing the holding of elections for these positions in accordance with §2870 prior to its amendment.

Appellants prayed further that a three-judge district court be convened pursuant to 28 U.S.C. § § 2281 and 2284 and 42 U.S.C. § 1973c (A. 10, 40). A three-judge district court held that the 1966 amendment did not come within the purview of and is not covered by the Voting Rights Act of 1965 and dismissed the complaints (A. 28-29, 80-81).* This appeal followed.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this appeal because a three-judge district court was properly convened below in accordance with Section 5 of the Voting Rights Act of 1965. The language of the last sentence of Section 5 and

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* The complaints in each of these cases originally contained a second claim for relief based on the Fifteenth Amendment. Appellants withdrew this claim for the purpose of expediting the hearing in to order to secure relief in time for the November 1967 elections.

the place of this language in the section support appellants' conclusion of the propriety of a three-judge district court action here. In addition, the purposes of the Voting Rights Act in particular, and of three-judge district courts in general, support appellants' position.

There is a clear controversy in this case between the State of Mississippi which has failed to comply with its duty to submit the 1966 amendment of § 2870 of the Mississippi Code, a law which permits the change of electing County Supervisors by district to at large, to either the Attorney General of the United States or the United States District Court for the District of Columbia in accordance with Section 5 of the Voting Rights Act of 1965. Appellants, who have been injured by appellees' failure to comply with its statutory duty, have a right to compel such compliance.

The issue before this Court is whether the 1966 amendment is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act. Appellants contend that the language of Sections 5 and 14 of the Act, its legislative history and its broad purpose to finally achieve the guarantees of the Fifteenth Amendment compel the conclusion that the amendment to § 2870 relates to the effectiveness of appellants' right to vote within the meaning of the Voting Rights Act. Whether the amendment actually discriminates against appellants is not before this Court. As long as the Act involves the effectiveness of appellants' right to vote, Mississippi, a state covered by the Act, must submit the law for approval.

Accordingly, appellants respectfully request this Court to set aside the elections held in Forrest and Adams counties pursuant to said 1966 amendment and to direct the elections by District for this office which should have been held in November 1967. In addition, this Court should enjoin enforcement of the law as amended until Mississippi complies with Section 5 by submitting the new law to the Attorney General or the United States District Court for the District of Columbia.

ARGUMENT

I. A THREE-JUDGE COURT WAS PROPERLY CONVENED AND APPELLANTS, AS PRIVATE PARTIES, HAVE A RIGHT TO SUE IN THIS CAUSE.

A. A Three-Judge court was properly convened.

This Court has jurisdiction of this appeal if a three-judge court was properly convened below. 28 U.S.C. §1253, 42 U.S.C.§ 1973c. Appellants contend that the phrase "Any action under this section shall be heard and determined by a court of three judges ..." in Section 5 of the Voting Rights Act (42 U.S.C. 1973c), and its location at the bottom of said section clearly require the convening of a three-judge court for the reasons stated in the Memorandum for the United States as Amicus Curiae, pp. 8-9. Appellants would add to that discussion several points. The words "any action" and "a court of three judges" (our emphasis) are very general phrases, and suggest more than the declaratory judgment action brought by a covered State in the United States District

Court for the District of Columbia. If Congress just had this one suit in mind, it would have been natural to place the three-judge requirement in the first sentence of the paragraph. Moreover, the last sentence of the paragraph is superfluous with respect to the suit described as a "subsequent action to enjoin enforcement of such qualification ..." (following the approval of the Attorney General or the District of Columbia court of the new State law), because such an action would be under the Fifteenth Amendment and would, therefore, require a three-judge court under 28 U.S.C. § 2281 in any event. Unless the last sentence refers to a suit such as the instant cause, it has no utility whatsoever.

The purposes of the Voting Rights Act of 1965 and of three-judge courts in general support appellants' contention that all actions related to Section 5 must be heard by a three-judge court. As is shown more fully in Argument II below, the whole thrust of the Voting Rights Act is to ensure that Negroes in the South, who have been deprived of the franchise too long, are enfranchised as quickly as possible. A major purpose of Section 5 is to permit both States and private parties fast, objective and effective review of legislation affecting voting rights, so as to minimize the interference with the right to vote and state legislation. Three-judge district courts are designed to (1) expedite review by direct appeal to this Court; (2) provide greater restraint and dignity in actions seeking to enjoin the operation of state statutes; (3) reduce the possibility of intimidation in the deliberations of a single

judge; and (4) ensure a more critical and objective examination of the important case. Section 5 manifests the conclusion of Congress that a three-judge court should be required – for all of the reasons there are three judge courts– when the State is a plaintiff in an action for a declaratory judgment. The rationale applies equally to a case such as this one in which the appellants are indirectly, by seeking compliance with the Voting Rights Act, alleging a deprivation of a most basic right, the right to vote, and the State is a defendant.

B. Appellants, as private parties, have a right to sue in this cause.

Section 12(f) (42 U.S.C. § 1973j(f)) of the Voting Rights Act of 1965 provides:

> "(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this subchapter shall have exhausted any administrative or other remedies that may be provided by law."

In addition to conferring jurisdiction, this provision implies the standing of private persons to initiate proceedings to "assert rights under the provisions of [the Voting Rights Act]." Cf. *Morris v. Fortson*, 261 F. Supp. 538, 541 n. 3 (N.D. Ga. 1966). After several references in

Section 12 to the Attorney General, Congress refers in section (f) to the assertion of rights by "a person". One must conclude that Congress, by using the general term "person" rather than "the Attorney General" contemplated suits by private parties under the Voting Rights Act. Similarly, in 28 U.S.C. § 1343, which also confers jurisdiction in this action on the federal court, the Legislature again used the very general term "any person" rather than a specific one and the implication is the same.

In the instant case, there is a clear controversy between Mississippi, which has a duty to submit certain legislation for review, and appellants, Negro citizens, whose voting rights have been impaired by the State's failure to comply with Section 5 of the Voting Rights Act. Even if a right of action by private persons were not implied by the terms of the Voting Rights Act, the courts have consistently held that a breach of statutory duty gives rise to a right of action by an injured party for whose benefit the statute was enacted. *Goodman v. H. Hentz Co.*, 265 F. Supp. 440 (N.D. Ill. 1967); *Mack v. Mishkin*, 172 F. Supp. 885 (S.D.N.Y. 1959); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1941). Such a right emanates from the statute even though it does not expressly give a private party the right to bring an action. *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961). Judge Wisdom dealt, in *Bossier Parish School Board v. Lemon*, 370 F. 2d 847, 852 (5th Cir. 1967), with such a situation and concluded that:

"Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdrawal of federal assistance. . . . [T]he section is a prohibition, not an admonition. In the absence of a procedure through which individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts .... The Negro school children, as beneficiaries of the Act, have standing to assert their section 601 rights."

Even though enforcement powers have been granted to public officials, such as the Attorney General in this instance, the courts have allowed private parties to enforce their rights in order to lighten the Attorney General's burden of investigation (in this case to give him knowledge of the amendment in question), and more importantly to ensure parties whose rights are most immediately affected by noncompliance with legislation that they need not rely upon a governmental agency to protect their rights in the courts. *Dann v. Studebaker-Packard Corp., supra; Subin v. Goldsmith,* , 224 F.2d 753 (2d Cir. 1955).

Under appellee's interpretation of the Act, there is no recourse for injured persons such as appellants should the Attorney General, for whatever reason, including merely a particularly heavy workload, refuse to enforce compliance with the Act.* At that point the only remedy left to the

persons affected by what might be a discriminatory amendment is to bring a private suit based on the Fifteenth Amendment. This consequence is most serious as a suit to enforce the Fifteenth Amendment can be a monumental, difficult and expensive effort. The result is precisely what Congress meant to avoid by enacting the Voting Rights Act in response to a finding that previously existing remedies to enforce the guarantees of the Fifteenth Amendment were inadequate. *South Carolina v. Katzenbach, supra* at 309-316. Appellants conclude therefore, that as private parties they had standing to compel Mississippi's compliance with the Voting Rights Act.

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* Section 12(d) of the Act (42 U.S.C. § 1973j(d)) states in substance that when any person has violated the Voting Rights Act "the Attorney General may institute for the United States ... an action ..." (Emphasis added.) It is thus clear that the Attorney General has the discretion not to sue. It is interesting to note that the Attorney General, as of January 1968, had only once acted to force a state to comply with Section 5 (United States v. Crook, 253 F. Supp. 915 (M.D. Ala. 1966). United States Commission on Civil Rights, Political Participation, 1968, pp. 164-65.

II. SECTION 2870 OF THE MISSISSIPPI CODE, AS AMENDED IN 1966, RELATES TO APPELLANTS' RIGHT TO VOTE AND THEREBY CONSTITUTES A STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING WITHIN THE MEANING OF SECTION 5 AND 14 OF THE VOTING RIGHTS ACT OF 1965.

A. The Operation of Section 5 of the Voting Rights Act of 1965.

In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), this Court broadly stated the purpose of the Voting Rights Act of 1965:

> "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. .... Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious definance of the Constitution." *Id.* at 308, 309.

Congress passed voting legislation in 1957, 1960 and 1964 which had been singularly unsuccessful. In Forrest County, Mississippi, for example,the home of appellant Fairley herein, 236 Negroes were registered to vote prior to 1965 in a county whose voting age Negro population

was 7,495.*

One part of the problem was the great ingenuity of Southern states to contrive "new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina v. Katzenbach, supra,* 383 U.S. at 335. In the time it would take for the Government to learn about such newly-adopted procedures and to litigate their validity, the new rules would have done their damage.** As Attorney General Nicholas deB. Katzenbach testified at the hearing on the bill:

> "Our experience in the area that would be covered by this bill has been such to indicate frequently on the part of the State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States." *House Hearings,* p. 60.

Congress thus officially recognized the discriminatory nature and application of previous Southern voting statutes and decreed that no future laws could become operative prior to the scrutiny of the Attorney General or

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* Report of the United States Commission on Civil Rights, supra, p. 244.

** Hearing on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter House Hearings), p. 72. Hearing on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., (hereinafter Senate Hearings) p. 237.

the District of Columbia Court.

To those familiar with the overwhelming past history of discriminatory voting legislation and practices in Mississippi, the need for the protection of Section 5 was readily apparent. As this Court observed in *United States v. Mississippi*, 380 U.S. 128, 135-136 (1965):

> "It is apparent that the complaint ... charged a long standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the registration statistics ... would seem to show had been remarkably successful."

See *United States v. Lynd*, 349 F.2d 785 (5th Cir. 1965); *United States v. Mississippi*, 359 F.2d 103 (5th Cir. 1966); *United States v. Ramsey*, 353 F.2d 650 (5th Cir. 1965); *United States v. Ward*, 345 F.2d 857 (5th Cir. 1965).

Having demonstrated the extraordinary history of racial discrimination in voting in Mississippi it is hornbook law that a presumption arises that facts or conditions once proven are deemed to continue to exist unless proven otherwise. *Cassell v. Texas*, 339 U.S. 282, 293 (1950); *Allstate Finance Corp. v. Zimmerman*, 330 F.2d 740 (5th Cir. 1964); *NLRB v. Piqua Munising Wood Prods. Co.*, 109 F.2d 552 (6th Cir. 1940); 2 Wigmore, *Evidence*, Section 437 (3d ed. 1940).

New Mississippi voting statutes and practice were thus

presumed to be discriminatory. Mississippi was in effect placed on "probation" with the burden on her to prove to the Attorney General or to a District of Columbia Court the nondiscriminatory nature of the proposed statute or rule.

Congress' remedy for this pervasive and seemingly unremitting evil of voting discrimination was very strong medicine indeed. In the covered states, which includes Mississippi, Congress suspended the use of virtually all State "test or devices" with respect to voter registration. If the States failed to register Negroes without regard to race, the federal government would provide examiners to do the job.

But registration of Negroes was only part of the problem. It was necessary to protect this gain by preventing a repetition of the practice of Southern Legislatures of constantly enacting more sophisticated rules to deny or dilute the hard-won right to vote. Accordingly, Section 5 of the Act provided that no "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" could be enacted or administered before the state submitted the new statute or rule to the Attorney General of the United States for his approval. Alternatively, the State was authorized to seek a declaratory judgment from the United States District Court for the District of Columbia that the new statute or rule did "not have the purpose and ... [or] the effect of denying or abridging the right to vote on account of race or color." Justice Black, dissenting in

South Carolina v. Katzenbach, supra, described Section 5 as follows:

> "Section 5 goes on to provide that a State covered by §4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color." 383 U.S. at 356.

B. Section 5 applies to § 2870.

Prior to May 27, 1966, each of the five members of the Board of Supervisors were elected by the qualified electors of his particular district or beat. The amendment to § 2870 passed on that date provided the Board with discretion to adopt an at large election procedure whereby all five members would be elected by all the qualified electors of the county. The statute thus enabled the Board to issue an order relating to the weight or the effectiveness of the vote of qualified electors such as appellants herein.

There can be no question that this 1966 amendment fits literally within the "all-inclusive,"* scope of the words "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" used in Section 5 of the Voting Rights Act. The quoted phrase

* Senate Hearings, p. 192.

could hardly be broader in scope. In addition, Congress defined "voting" very generally in Section 14(c)(1) (42 U.S.C. §1973l(c)(1)) as including "all action necessary to make a vote *effective* in any primary, special or general election ..." (Emphasis added). Congress did not merely say that Section 5 encompasses all standards, practices or procedures with respect to "registration" or "tests and devices". Rather, when Section 5 and 14 (c)(1) are read together, Congress declared that all standards, practices or procedures with respect to that which makes a vote effective are covered by Section 5.*

It is clear, appellants contend, that the adoption of an at large election procedure relates to the "effectiveness" of appellants' right to vote. As this Court has stated:

> "... the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as *effectively* as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). (Emphasis added.)

Appellees respond, however, that they have a "noble" purpose, deserving of "admiration"** for they are merely attempting to comply with this Court's one man-one vote

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* The broad scope of the language was emphasized further by the proscription against new state statutes which abridge as well as deny the right to vote.

** Appellees' Response to the Memorandum for the United States as Amicus Curiae, pp. 14, 17.

rule in reapportionment cases. Initially, it should be noted that whether Mississippi's purpose is racial discrimination or a good faith attempt to comply with the requirements of reapportionment, is not the issue before this Court. That issue should be resolved by the Attorney General of the United States or the United States District Court for the District of Columbia upon Mississippi's submission of the new law. The issue before the Court below and this Court is solely whether the 1966 amendment to § 2870 relates to the effectiveness of appellants' vote.

Appellants believe that it does so relate. Indeed the granting of the power to switch to an at large election procedure creates a grave potential for abuse of that power – to the detriment of Negroes such as appellants. Prior to the 1966 amendment, the Board of Supervisors could merely redraw district boundaries. Under § 2870 as amended, however, these Supervisors also have the option to continue separate district elections or to switch to an at large procedure. Suppose we have a county such as Adams County, Mississippi, where Negroes constitute a majority of the population in certain districts, but are a minority county-wide.** Under the old system, the white supervisors might have had to complete the extraordinarily difficult process of gerrymandering district lines to continue in office the white supervisors from the Negro majority beats. With the 1966 amendment, however, the Board can adopt the at large plan and accomplish the same

** United States Census of Population: 1960, pp. 26-48.

purpose far more easily. Moreover, this racially discriminatory stroke can be achieved under the facade of attempting to comply with the one man-one vote mandate of the Constitution. As we have stated, Mississippi has a long history of racial discrimination, and as a State covered by the Voting Rights Act, is on "probation" with the burden on her to prove the nondiscriminatory motivation behind her new statutes. Thus appellees must be compelled to submit any new plan affecting voting to the Attorney General of the United States or the District of Columbia court. It is to that Court, or the Attorney General, that Mississippi should assert its claim of bona fide motivation – and go on to prove nondiscriminatory effect as well.

Appellees argue that Congress could not have intended that all changes in the covered states relating to the apportioning and districting of governmental bodies should be submitted to the District of Columbia court. On the contrary, Congress intended that any new standard, practice or procedure which relates to the effectiveness of the right to vote be submitted for review. As Attorney General Nicholas deB. Katzenbach testified during the hearings on the bill, "two or three" types of state laws could be written out of the section, but "there are precious few, because there are an awful lot of things that could be started for the purpose of evading the Fifteenth Amendment if there is a desire to do so." *House Hearings*, p. 95.

In buttressing its argument, appellees argue that requiring Mississippi to submit the 1966 amendment to the

Attorney General or the District of Columbia court "would seriously impede, if not prevent, the implementation of ...*Avery v. Midland County Texas*, 88 S. Ct. 1114." Appellees' response to the Memorandum of the United States as Amicus Curiae, pp. 13-14. Although appellees are thus conjuring up the threat of a large number of reapportionment cases for the District of Columbia court to review, there is no reason for a bottleneck to occur. All that would be required is for the covered states to submit to the Attorney General the reapportionment plans enacted after the passage of the Voting Rights Act in August 1965. If the plans have been enacted and administered without racial motivation, the Attorney General will approve them within 60 days. If unlawful motivation provoked their enactment, however, it is certainly time for their modification.

The Voting Rights Act was intended to make effective once and for all the guarantees of the Fifteenth Amendment. Since the 1966 amendment to § 2870 relates to the effectiveness of appellants' right to vote, and may well constitute a "sophisticated ... mode of discrimination"* *(Lane v. Wilson*, 307 U.S. 268, 275), this

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* There is the possibility that the Voting Rights Act may no longer cover Mississippi after 1970. Section 4(b) of the Act (42 U.S.C. § 1973b(a). Unless Mississippi is required to submit the "sophisticated modes of discrimination" laws, the enfranchisement of Negroes may well prove illusory.

Court should compel Mississippi to comply with the Voting Rights Act by submitting the law for approval.**

III. THIS COURT SHOULD SET ASIDE THE ELECTIONS HELD PURSUANT TO § 2870 AS AMENDED, AND ORDER ELECTIONS BY DISTRICT IN ORDER TO CURE THE INJURY CAUSED BY MISSISSIPPI'S FAILURE TO COMPLY WITH THE VOTING RIGHTS ACT.

Since the District Court should have enjoined the enforcement of § 2870, as amended in 1966, and the election at large of members of the County Board of Supervisors in Adams and Forrest counties held pursuant to the implementation of said amendment until Mississippi complied with Section 5, this Court should set aside the elections held in Forrest and Adams counties pursuant to that law, enjoin its enforcement until Mississippi complies with 42 U.S.C. § 1973c, order elections by district to be held for vacant offices, and order the enforcement of §2870 prior to its 1966 amendment. In *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966), as in *Fairley* and *Marsaw*, Negro voters asked the District Court to enjoin an

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** Dusch v. Davis, 387 U.S. 112 (1967) is not authority for the issue in this case because the parties did not raise and this Court did not consider the applicability of the Voting Rights Act to that case.

election and the District Court refused. The Court of Appeals reversed and concluded that since the District Court should have enjoined the election, it was necessary to set aside the election and order a new election. The remedy approved in *Hamer* should be applied in *Fairley* and *Marsaw*. As this Court has stated, "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbaach, supra.* By enforcing §2870 as amended without complying with 42 U.S.C. §1973c, the State of Mississippi has again evidenced its intention to continue racial discrimination in voting. Only new elections properly held can cure that blight.

CONCLUSION

For the reasons stated, this Court should reverse the orders of the District Court and grant the relief requested by appellants.

Respectfully submitted,

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APPENDIX A*

"Section 2870.* Districts and boundaries.

Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one (1) member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed, or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

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*Section 2870 prior to its amendment in 1966 may be found in Volume 3 of the Mississippi Code at pp. 4-5. The 1966 amendment is reported in the 1966 Supplement to Volume 3 of the Mississippi Code at pp. 14-15.

Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and/or more than fifty per cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

Provided further, however, that in any county in the state bordering on the Gulf of Mexico or Mississippi Sound and having a population in excess of eighty thousand (80,000) according to the last federal census, the issue of election heretofore provided for shall be determined by a majority of the qualified electors of the county, and if such majority fail to vote affirmatively, no new petition shall be considered for four (4) years. Each such election shall be based upon a petition of twenty- five per cent (25%) of the qualified electors of the county, and to which petition shall be attached a map or plat defining the boundaries of each beat as proposed by said map or plat, and the election thereon shall be on such proposal.

And the board, whenever a majority of the qualified electors of the county shall have voted to change or alter the existing districts to those set forth and described in the petition, shall at its first meeting thereafter establish said proposed districts by order on its minutes, to be effective on the first day of January following, and in default thereof, may be commanded to do so by writ of mandamus.

When the districts are changed, by the qualified electors in an election as aforesaid, the board, of its own motion, shall not change or alter said districts within four (4) years thereafter.

The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next general election wherein said supervisors are elected.

If twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter all elections for members of boards of supervisors shall so be held. If not,

members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of boards of supervisors again until two (2) years have transpired.

This act shall not be construed to effect any supervisors now holding office until the expiration and end of his present term of office."

*Material crossed out was deleted, and material underlined was added.

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub.L. 89–110, § 5, Aug. 6, 1965, 79 Stat. 439.

* * * * * * * * *

Definitions

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

CERTIFICATE OF SERVICE

I certify that I have this day mailed, via United States mail, postage prepaid, copies of the foregoing Brief of Appellants to the following:

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42 U.S.C. §§ 1971 (d) 6

42 U.S.C. §§ 1973c 2,3,4,5,6,9,11,25

42 U.S.C. § 1973j 11,13

42 U.S.C. § 1973l 21

Miss. Code §6252-07 14

Miss. Code §6271-08 ..... 2,3,4,5,6,7,8,14, 15,16,21,22,24,25

MISCELLANEOUS

2 Wigmore, Evidence, Sec. 437 3d ed. 1940) 19

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968
NO. 26

CHARLES E. BUNTON, ET AL.,
Appellants,
-vs-
JOE T. PATTERSON, ET AL.,
Appellees.

VERNON TOM GRIFFIN, ET AL.,
Appellants,
-vs-
JOE T. PATTERSON, ET AL.,
Appellees.

SETH BALLARD, ET AL.,
Appellants,
-vs-
JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLANTS

OPINIONS BELOW

The order in *Bunton* is reported at 281 F. Supp. 918. The orders in each of the other above-captioned cases are reported and are reprinted in appellants' separate appendix

(A. 33-34, 67-68 and 98-99).*

JURISDICTION

The District Court entered a judgment in each of the three consolidated cases on October 5, 1967. The Notice of Appeal in each case was filed on November 28, 1967.

The jurisdiction of the court below was based on 28 U.S.C. §§1343 (3) and (4), 2201 and 2202 and on 42 U.S.C. §§1971 (d), 1973c (j) and (f). A three-judge district court was required by 42 U.S.C. §1973c and 28 U.S.C. §2281.

The Supreme Court has jurisdiction of this direct appeal pursuant to 42 U.S.C. § 1973c and 28 U.S.C. §1253.

STATUTES INVOLVED

The statutes involved are Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c and 6271-08 of the Mississippi Code of 1942, prior to its amendment in 1966, as amended in 1966 and as amended in 1968. These statutes are printed in appendix A *infra* of appellant's brief.

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* "A." refers to the portion of the record printed as a separate appendix by appellant. Appendices A and B are printed in the back of this brief.

QUESTIONS PRESENTED

1. Whether the three-judge court below was properly convened pursuant to 42 U.S.C. § 1973c and whether appellants, as private parties, had a right to sue therein.

2. Whether § 6271-08 of the Mississippi Code, as amended in 1966, which deprives the qualified electors of a small number of Mississippi counties of the opportunity to elect, and the potential candidates of an opportunity to run for, county superintendent of education is a statute dealing with "a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965.

3. Whether the State of Mississippi violated Section 5 of the Voting Rights Act of 1965 by failing to submit the amendment to § 6271-08 to the Attorney General of the United States or to seek a declaratory judgment from the United States District Court for the District of Columbia that the statute is free of racial discrimination prior to enforcing said 1966 amendment.

4. Whether, since no elections for the position of county superintendent of education were held on November 7, 1967, in each of three counties herein, in accordance with the amendment to § 6271-08, this Court should set aside any appointments made pursuant to

§6271-08 as amended and order said elections for the position of county superintendent of education pursuant to §6271-08 prior to its 1966 amendment.

STATEMENT OF THE CASE

Prior to June 17, 1966, every county in Mississippi except one* elected its superintendent of education unless 20% of the qualified electors of the county petitioned for an election pursuant to §6271-08 of the Mississippi Code to make the position appointive. (See appendix A attached to this brief for the statute and its later amendments). Effective June 17, 1966, the Mississippi Legislature amended the statute to provide that in 11 of Mississippi's 82 counties, including the three counties represented by appellants here, the superintendent of education *must* be appointed rather than elected.** (See appendix B infra.)

The Voting Rights Act of 1965 applies to Mississippi and provides in Section 5,42 U.S.C. §1973c that whenever a State or political subdivision thereof:

> "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964,"

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* Infra, p. 15

** The statute was unchanged with respect to the remaining 71 counties. In 1968, the statute was amended again by adding two counties to and dropping one county from the list of counties requiring appointments to the position. (Appendix A infra).

such State or political subdivision cannot enforce or apply such change until it has either (1) instituted an action in the United States District Court for the District of Columbia for a declaratory judgment that

> "such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. §1973c)

and such judgment has been entered, or (2) submitted the change to the Attorney General of the United States and had no objection interposed by the Attorney General within 60 days after such submission.

Neither the State of Mississippi, nor any of its officials, nor Jefferson, Claiborne or Holmes Counties (in which the named plaintiffs reside), nor any of their officials has instituted any action in the United States District Court for the District of Columbia with respect to §6271-08 of the Mississippi Code, as amended, nor submitted such amendment to the Attorney General of the United States.

Appellants are Negro qualified electors and potential candidates for the position of county superintendent of education in Jefferson, Claiborne and Holmes Counties, Mississippi. They represent a class of persons similarly situated (A. 2, 37, 71). In each of the three suits, appellants seek to have the 1966 amendment to §6271-08

of the Mississippi Code declared such a change in "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting," within the purview of Section 5 of the Voting Rights Act of 1965, as to require appellees to comply with Section 5. Appellants also seek injunctive relief, restraining appellees, their agents, employees, successors and persons in concert with them from enforcing, implementing or otherwise giving effect to §6271-08 of the Mississippi Code, as amended until appellees have complied. At the time of the filing of these suits, prior to the holding of the November 1967 elections, appellants prayed for an order enjoining the appointment of the superintendent of education in their respective counties, unless the voters of the counties authorized same pursuant to §6271-08, and for an order requiring appellees to hold elections to fill said position in November 1967 (A. 13-14, 48, 82). Since the elections should have been held in November 1967, appellants now pray for an order setting aside said appointments of superintendents of education and directing the holding of elections for these positions in accordance with §6271-08 prior to its amendment.

Appellants prayed further that a three-judge district court be convened pursuant to 28 U.S.C. §§2281 and 2283 and 42 U.S.C. §1973c (A. 13. 47-48, 82). A three-judge district court was convened and the cases consolidated for hearing. The Court held that the 1966 amendment did not come within the purview of and is not covered by the Voting Rights Act of 1965 and dismissed

the complaints (A. 33-34, 67-68, 98-99.)* This appeal followed.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this appeal because a three-judge district court was properly convened below in accordance with Section 5 of the Voting Rights Act of 1965. The language of the last sentence of Section 5 and the place of this language in the section support appellants' conclusion of the propriety of a three-judge district court action here. In addition, the purposes of the Voting Rights Act, in particular, and of three-judge district courts in general, support appellants' position.

There is a clear controversy in this case between the State of Mississippi which has failed to comply with its duty to submit the 1966 amendment of §6271-08 of the Mississippi Code to either the Attorney General of the United States or the United States District Court for the District of Columbia in accordance with Section 5 of the Voting Rights Act of 1965. Appellants, who have been injured by appellees' failure to comply with its statutory duty, have a right to compel such compliance.

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* The complaints in each of these cases originally contained a second claim for relief based on the Fifteenth Amendment. Plaintiffs withdrew this claim for the purpose of expediting the hearing in order to secure relief in time for the November 1967 elections.

The county superintendent of education, the official whose position is no longer elective under the amendment to §6271-08, is the full-time professional official with principal responsibility for the education of appellants' children. Effective June 17, 1966, the State of Mississippi required that this office be made appointive in 11 of Mississippi's 82 counties, nine of which have a Negro population majority. Under the amended law, the white-controlled county board of education appoints the superintendent.

The issue before this Court is whether the 1966 amendment is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act. Appellants contend that the language of Section 5, its legislative history and its broad purpose to finally achieve the guarantees of the Fifteenth Amendment compel the conclusion that the amendment to §6271-08 renders less effective appellants' right to vote within the meaning of the Voting Rights Act. Accordingly, appellants respectfully request this Court to set aside any appointments of county superintendents of education pursuant to said 1966 amendment and to direct the elections for this office which should have been held in November 1967. In addition, this Court should enjoin enforcement of the law as amended until Mississippi complies with Section 5 by submitting the new law to the Attorney General or the United States District Court for the District of Columbia.

ARGUMENT

I. A THREE-JUDGE COURT WAS PROPERLY CONVENED AND APPELLANTS, AS PRIVATE PARTIES, HAVE A RIGHT TO SUE IN THIS CAUSE.

A. A Three-Judge court was properly convened.

This Court has jurisdiction of this appeal if a three-judge court was properly convened below. 28 U.S.C. §1253, 42 U.S.C. §1973c. Appellants contend that the phrase "Any action under this section shall be heard and determined by a court of three judges ..." in Section 5 of the Voting Rights Act (42 U.S.C. § 1973c), and its location at the bottom of said section clearly require the convening of a three-judge court for the reasons stated in the Memorandum for the United States as Amicus Curiae, pp. 8-9. Appellants would add to that discussion several points. The words "any action" and "a court of three judges" (our emphasis) are very general phrases, and suggest more than the declaratory judgment action brought by a covered State in the United States District Court for the District of Columbia. If Congress just had this one suit in mind, it would have been natural to place the three-judge requirement in the first sentence of the paragraph. Moreover, the last sentence of the paragraph is superfluous with respect to the suit described as a "subsequent action to enjoin enforcement of such qualification ..." (following the approval of the Attorney General or the District of Columbia court of the new State

law), because such an action would be under the Fifteenth Amendment and would, therefore, require a three-judge court under 28 U.S.C. § 2281 in any event. Unless the last sentence refers to a suit such as the instant cause, it has no utility whatsoever.

The purposes of the Voting Rights Act of 1965 and of three-judge courts in general support appellants' contention that all actions related to Section 5 must be heard by a three-judge court. As is shown more fully in Argument II below, the whole thrust of the Voting Rights Act is to ensure that Negroes in the South, who have been deprived of the franchise too long, are enfranchised as quickly as possible. A major purpose of Section 5 is to permit both States and private parties fast, objective and effective review of legislation affecting voting rights, so as to minimize the interference with the right to vote and state legislation. Three-judge district courts are designed to (1) expedite review by direct appeal to this Court; (2) provide greater restraint and dignity in actions seeking to enjoin the operation of state statutes; (3) reduce the possibility of intimidation in the deliberations of a single judge; and (4) ensure a more critical and objective examination of the important case. Section 5 manifests the conclusion of Congress that a three-judge court should be required -- for all of the reasons there are three judge courts-- when the State is a plaintiff in an action for a declaratory judgment. The rationale applies equally to a case such as this one in which the appellants are indirectly, by seeking compliance with the Voting Rights Act, alleging a deprivation of a most basic right, the right to vote, and the State is a defendant.

B. Appellants, as private parties, have a right to sue in this cause.

Section 12(f) (42 U.S.C. § 1973j(f)) of the Voting Rights Act of 1965 provides:

> "(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this subchapter shall have exhausted any administrative or other remedies that may be provided by law."

In addition to conferring jurisdiction, this provision implies the standing of private persons to initiate proceedings to "assert rights under the provisions of [the Voting Rights Act]." Cf. *Morris v. Fortson*, 261 F. Supp. 538, 541 n. 3 (N.D. Ga. 1966). After several references in Section 12 to the Attorney General, Congress refers in section (f) to the assertion of rights by "a person". One must conclude that Congress, by using the general term "person" rather than "the Attorney General" contemplated suits by private parties under the Voting Rights Act. Similarly, in 28 U.S.C. § 1343, which also confers jurisdiction in this action on the federal court, the Legislature again used the very general term "any person" rather than a specific one and the implication is the same.

In the instant case, there is a clear controversy between Mississippi, which has a duty to submit certain

legislation for review, and appellants, Negro citizens, whose voting rights have been impaired by the State's failure to comply with Section 5 of the Voting Rights Act. Even if a right of action by private persons were not implied by the terms of the Voting Rights Act, the courts have consistently held that a breach of statutory duty gives rise to a right of action by an injured party for whose benefit the statute was enacteed, *Goodman v. H. Hentz Co.,* 265 F. Supp. 440 (N.D. Ill. 1967); *Mack v. Mishkin,* 172 F. Supp. 885 (S.D.N.Y. 1959); *Kardon v. National Gypsum Co.,* 69 F. Supp. 512 (E.D. Pa. 1941). Such a right emanates from the statute even though it does not expressly give a private party the right to bring an action. *Dann v. Studebaker-Packard Corp.,* 288 F.2d 201 (6th Cir. 1961). Judge Wisdom dealt, in *Bossier Parish School Board v. Lemon,* 370 F. 2d 847, 852 (5th Cir. 1967), with such a situation and concluded that:

> "Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdrawal of federal assistance. . . . [T]he section is a prohibition, not an admonition. In the absence of a procedure through which individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts .... The Negro school children, as beneficiaries of the Act, have standing to assert their section 601 rights."

Even though enforcement powers have been granted to public officials, such as the Attorney General in this

instance, the courts have allowed private parties to enforce their rights in order to lighten the Attorney General's burden of investigation (in this case to give him knowledge of the amendment in question), and more importantly to ensure parties whose rights are most immediately affected by noncompliance with legislation that they need not rely upon a governmental agency to protect their rights in the courts. *Dann v. Studebaker-Packard Corp., supra; Subin v. Goldsmith,* 224 F.2d 753 (2d Cir. 1955).

Under appellee's interpretation of the Act, there is no recourse for injured persons such as appellants should the Attorney General, for whatever reason,including merely a particularly heavy workload, refuse to enforce compliance with the Act.* At that point the only remedy left to the persons affected by what might be a discriminatory amendment is to bring a private suit based on the Fifteenth Amendment. This consequence is most serious as a suit to enforce the Fifteenth Amendment can be a monumental, difficult and expensive effort. The result is precisely what Congress meant to avoid by enacting the Voting Rights Act in response to a finding that previously

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* Section 12(d) of the Act (42 U.S.C., § 1973j(d)) states in substance that when any person has violated the Voting Rights Act "the Attorney General may institute for the United States ... an action..." (Emphasis added.) It is thus clear that the Attorney General has the discretion not to sue. It is interesting to note that the Attorney General, as of January 1968, had only once acted to force a state to comply with Section 5, United States v. Crook, 253 F. Supp. 915 (M. D. Ala. 1966). United States Commission on Civil Rights, Political Participation, 1968, pp. 164-65.

existing remedies to enforce the guarantees of the Fifteenth Amendment were inadequate. *South Carolina v. Katzenbach, supra* at 309-316. Appellants conclude therefore, that as private parties they had standing to compel Mississippi's compliance with the Voting Rights Act.

II. SECTION 6271-08 OF THE MISSISSIPPI CODE, AS AMENDED IN 1966, DEPRIVES APPELLANTS OF THE RIGHT TO VOTE FOR, AND RUN FOR, THE POSITION OF COUNTY SUPERINTENDENT OF EDUCATION AND THEREBY CONSTITUTES A STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965.

A. Consequences of §6271-08.

The county superintendent of education is the full-time professional official with principal responsibility for the education of the children of a county. He has the power and duty, for example, to enter into contracts with principals and teachers and to administer the educational policies set forth by the county board of education. §6252-07 of the Mississippi Code (1966 Cum. Supp.). This Court has charged county school boards in Mississippi "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," *Green v. School Board of New Kent County,*

_____ U.S. _____, 20 L.ed. 2d 716, 723 (1968). The county superintendent of education is similarly charged with the day-to-day responsibility for achievement of this "unitary system." This official performance of his job, therefore, substantially affects the constitutional right of Negro children to a good education in an integrated school.

Prior to June 17, 1966, §6271-08 of the Mississippi Code provided that the position of county superintendent of education shall be elective in all counties except one* unless 20% of the qualified electors of such county file a petition and thereby force an election to determine whether the position shall be made appointive. Effective June 17, 1966, the statute was amended to require the appointment of county superintendents of education in 11 Mississippi counties regardless of the wishes of the qualified electors of those counties. Nine of these 11 counties have a Negro population majority, and now have or may soon have a Negro voting majority (see Appendix B *infra*). Plaintiffs and their class of Negro qualified electors and potential candidates for the position of county superintendent of education have therefore been deprived of the right to vote for, to run for and probably to elect, members of their race to this vital position in nine Mississippi counties.*

With respect to the 11 counties in question, §6271-08

* The statute directed that the post shall be appointive in Washington County.

* Effective May 16, 1968, Mississippi again amended 6271-08, adding one county (Yazoo) with a Negro population majority and deleting one of the two counties with a white voting majority (Lincoln) from the list of counties in which

(b) provides that the superintendent of education shall be appointed by the county board of education. The five members of the county board of education (one from each of the five districts in the county) are elected for staggered six year terms, that is, the term of the member from district five expired January 1, 1967,** the terms of the members from districts one and two expire January 1, 1969 and the terms of the members from district three and four expired January 1, 1971. §6271-08 of the Mississippi Code. Since very few Negroes were registered to vote in Mississippi prior to the passage of the Voting Rights Act in August 1965, it is plain that whites will control these boards of education until at least January 1, 1971, and, accordingly, that whites will be appointed superintendent of education (four year terms) for many years. The consequences of the 1966 amendment are thus clear. The Negro plaintiffs and their class, who constitute a majority of the population in nine of the 11 counties affected by the amendment will have no opportunity to vote for the one full-time professional county official with primary responsibility for the education of their children.

The issue before this Court is whether this statute which deprives plaintiffs and their class of the right to vote for this official is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965. If, as is shown in Section B

(Continued)
superintendents of education are required to be appointed. Lafayette County, the home of the University of Mississippi with a white voting majority, was also required to appoint its superintendent of education as of January 1, 1972. (See Appendix B infra.)

** No Negroes were elected to this office in the November 1966 elections in any of the eleven counties.

and C below the answer is in the affirmative, this Court should order the State of Mississippi to suspend enforcement of the statute and to submit the amendment to the Attorney General of the United States; and if an objection is filed by the Attorney General, Mississippi should prove to the United States District Court for the District of Columbia that the 1966 statute is free of racial discrimination in its purpose and effect.

B. The Operation of Section 5 of the Voting Rights Act of 1965.

In *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), this Court broadly stated the purpose of the Voting Rights Act of 1965:

> "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."....
> "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Id.* at 308,309.

Congress passed voting legislation in 1957, 1960 and 1964 which had been singularly unsuccessful. In Holmes County, Mississippi, for example, the home of appellant Griffin herein, 20 Negroes were registered to vote prior to

1965 in a county whose 21 and over Negro population was 8757.*

One part of the problem was the great ingenuity of Southern States to contrive "new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina v. Katzenbach, supra,* 383 U.S. at 335. In the time it would take for the Government to learn about such newly adopted procedures and to litigate their validity, the new rules would have done their damage.** As Attorney General Nicholas deB. Katzenbach testified at the hearing on the bill:

> "Our experience in the area that would be covered by this bill has been such as to indicate frequently on the part of the State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States." *House Hearing,* p. 60.

Congress thus officially recognized the discriminatory nature and application of previous Southern voting

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* Report of the United States Commission on Civil Rights, supra, p. 244 United States Census of population: 1960, Mississippi, p. 26-27.

** Hearing on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter House Hearings), p. 72; Hearing on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., p. 237.

statutes and decreed that no future laws could become operative prior to the scrutiny of the Attorney General or the District of Columbia Court.

To those familiar with the overwhelming past history of discriminatory voting legislation and practices in Mississippi, the need for the protection of Section 5 was readily apparent. As this Court observed in *United States v. Mississippi*, 380 U.S. 128, 135-136 (1965):

> "It is apparent that the complaint ... charged a long standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the registration statistics ... would seem to show had been remarkably successful."

See *United States v. Lynd*, 349 F.2d 785 (5th Cir. 1965); *United States v. Mississippi*, 359 F.2d 103 (5th Cir. 1966); *United States v. Ramsey*, 353 F.2d 650 (5th Cir. 1965); *United States v. Ward*, 345 F.2d 857 (5th Cir. 1965).

Having demonstrated the extraordinary history of racial discrimination in voting in Mississippi it is hornbook law that a presumption arises that facts or conditions once proven are deemed to continue to exist unless proven otherwise. *Cassell v. Texas*, 339 U.S. 282, 293 (1950); *Allstate Finance Corp. v. Zimmerman*, 330 F.2d 740 (5th Cir. 1964); *NLRB v. Piqua Munising Wood Prods. Co.*, 109 F.2d 552 (6th Cir. 1940); 2 Wigmore, *Evidence*, Section 437 (3d ed. 1940).

New Mississippi voting statutes and practice were thus presumed to be discriminatory. Mississippi was in effect placed on "probation" with the burden on her to prove to the Attorney General or to a District of Columbia Court the nondiscriminatory nature of the proposed statute or rule.

Congress' remedy for this pervasive and seemingly unremitting evil of voting discrimination was very strong medicine indeed. In the covered states, which includes Mississippi, Congress suspended the use of virtually all State "test or devices" with respect to voter registration. If the States failed to register Negroes without regard to race, the federal government would provide examiners to do the job.

But registration of Negroes was only part of the problem. It was necessary to protect this gain by preventing a repetition of the practice of Southern Legislatures of constantly enacting more sophisticated rules to deny or dilute the hard-won right to vote. Accordingly, Section 5 of the Act provided that no "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" could be enacted or administered before the state submitted the new statute or rule to the Attorney General of the United States for his approval. Alternatively, the State was authorized to seek a declaratory judgment from the United States District Court for the District of Columbia that the new statute or rule did "not have the purpose and ... the

effect of denying or abridging the right to vote on account of race or color." Justice Black, dissenting in *South Carolina v. Katzenbach, supra,* described Section 5 as follows:

> "Section 5 goes on to provide that a State covered by §4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color." 383 U.S. at 356.

C. The Scope of Section 5

In the instant case, § 6271-08 withdraws from appellants and their classes the right to vote for, and run for, the position of county superintendent of education. Appellants contend that this law fits easily within the "all-inclusive" scope of the words "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," as used in Section 5 of the Voting Rights Act. The quoted phrase could hardly be broader in scope. This breadth of meaning is reinforced by the definition of "voting" provided by Section 14 (c) (1) of the Act (42 U.S.C. 1973 l (c) (1)) as including "all action necessary to make a vote effective in any primary, special or general election ..." (emphasis added) A broad, rather than narrow, interpretation is given further support by the fact that Section 5 prevents not only the *denial* by a state

of the right to vote, but also any *abridgment* of that right. § 6271-08, of course, flatly *denies* appellants the right to vote for county superintendent of education. That this office remains elective is an obvious "prerequisite to voting" within the meaning of Section 5.

The legislative history of the Act also supports the view that the language of Section 5 should be given the broadest possible reading. Attorney General Katzenbach testified "before a subcommittee of the House Judiciary Committee that "two or three" types of state law could be written out of the section, but "there are precious few, because there are an awful lot of things that could be started for the purposes of evading the Fifteenth Amendment if there is a desire to do so." *House Hearings*, p. 95. Indeed, the Voting Rights Act as a whole was intended to make effective, once and for all, the Fifteenth Amendment of the Constitution. As the Attorney General put it:

> "Thus, it is clear that the Constitution will not allow racially discriminatory voting practices to stand. But it is even clearer, as we have seen, that the Constitution invites Congress to do more than stand by and watch the courts invalidate State practices. It invites Congress to take a positive role by outlawing the use of any practices utilized to deny rights under the 15th amendment. "
>
> This bill accepts that invitation. Senate Hearings, p. 22.

Congress having "outlawed" the use of any practices which effect voting in Mississippi until the State of Mississippi proves to the Attorney General or the United States District Court for the District of Columbia the nondiscriminatory nature of the proposed practice, it is incumbent upon this Court to compel Mississippi to abide by this procedure.

The one judicial construction of the language of Section 5 (other than the Court's conclusionary order below) supports appellants' contention regarding its broad scope. In *Sellers v. Trussell*, 253 F. Supp. 915 (M. D. Ala. 1966), the Alabama legislature extended for two years the terms of office of officials who had been elected at a time when Negroes had been deprived of the right to vote. According to Judge Rives, this statute both violated the Fifteenth Amendment and came within Section 5 since "to freeze elective officials into office is, in effect, to freeze Negroes out of electorate." 253 F. Supp. at 917.* Similarly, in this case, Mississippi has "frozen" whites into the position of county superintendent of education in nine counties with Negro majorities by the device of restricting the selection of superintendents to white-controlled county boards of education elected at a time when Negroes were deprived of the right to vote. Accordingly, Mississippi has effectively destroyed the value of

* Judge Johnson concluded that the statute was racially motivated in violation of the Fifteenth Amendment and found it unnecessary to reach the Voting Rights Act question. Judge Grooms dissented.

appellants' franchise with respect to this office.

It is, of course, unnecessary for this Court to conclude that § 6271-08 of the Mississippi Code, as amended in 1966, actually discriminates against Negroes, although appellants believe its discriminatory purpose is transparent. This Court must decide only that the amended law affects "voting". That it does so within the meaning of Section 5 is, as we have stated, supported by the broad language of Section 5, the legislative history of the Act and the one judicial construction of its meaning. Unless the Act is read to cover a statute which completely denies appellants' right to vote for county superintendents of education, Congress will have failed again to make the Fifteenth Amendment effective. This Court should resist Mississippi's attempt to frustrate the Act, and, accordingly should hold § 6271-08 as amended in 1966, within the purview of Section 5 of the Voting Rights Act.**

** This Court's decision in Sailors v. Kent Board of Education, 387 U.S. 105 (1967), provides no support for Mississippi's argument in this case, for this Court stated there, "Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." 387 U.S. at 109. The function of the United States Attorney General and the United States District Court for the District of Columbia under Section 5 is to determine whether the amendment to § 6271-08 "runs afoul of [appellants.] federally protected right" under the Voting Rights Act and the Fifteenth Amendment. Sailors thus means only that Mississippi can make appointive the position of county superintendent of education when it complies with the Voting Rights Act and the Fifteenth Amendment.

III. THIS COURT SHOULD SET ASIDE THE APPOINTMENTS MADE PURSUANT TO § 6271-08, AS AMENDED, AND ORDER ELECTIONS IN ORDER TO CURE THE INJURY CAUSED BY MISSISSIPPI'S FAILURE TO COMPLY WITH THE VOTING RIGHTS ACT.

Since the District Court should have enjoined the enforcement of § 6271-08, as amended in 1966, and the appointment of any county superintendent of education pursuant to said amendment until Mississippi complied with Section 5, this Court should set aside any appointments made pursuant to that law, enjoin its enforcement until Mississippi complies with 42 U.S.C. §1973c, order elections to be held for vacant offices, and order the enforcement of § 6271-08 prior to its 1966 amendment. *Hamer v. Campbell,* 358 F.2d 215 (5th Cir. 1966). As this Court has stated, "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach, supra.* By enforcing §6271-08 as amended without complying with 42 U.S.C. §1973c, the State of Mississippi has again evidenced its intention to continue racial discrimination in voting. Only new elections promptly and fairly held can cure that blight.

CONCLUSION

For the reasons stated, this Court should reverse the order of the District Court and grant the relief requested by appellants.

Respectfully submitted,

LAWRENCE A. ASCHENBRENNER
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APPENDIX A

SECTION 5 OF THE VOTING RIGHTS ACT

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate offical of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub.L. 89–110, § 5, Aug. 6, 1965, 79 Stat. 439.

SECTION 6271-08 OF THE MISSISSIPPI CODE *

Section 6271-08 of the Mississippi Code as herein relevant, before amendment read:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall

* Prior to amendment in 1966 the Statute may be found in Volume 5 of the 1964 Cumulative Supplement to the Mississippi Code pp 392-93; the 1966 amendment may be found in Volume 5 of the 1966 Cumulative Supplement to the Mississippi Code, pp. 436-38; the 1968 Amendment may be obtained from the Secretary of State.

continue to be elective or shall be filled by appointment by the county board of education of said county. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provi-

sions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided."

Following its amendment in 1966, Section 6271-08, as herein relevant, read:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class Three county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county,

the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors. shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special

election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U. S. Highways 49 and 51, and State Highways 16, 17 and 43 and the Natchez Trace; in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U. S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect;[1] in any county created after 1916 through which the Yazoo River flows; in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a land-grant institution or lands contiguous thereto owned by the institution;[2] in any county lying within

the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960; in any county having a population of twenty-six thousand seven hundred fifty-nine (26,759) according to the 1960 Federal census, and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect; in any Class Three county wherein is partially located a national forest and wherein U.S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00; the county superintendent of education hereafter shall be appointed by the county board of education.

"In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972."

1. Underlined portion is description fitting Holmes County.

2. Underlined portion is description fitting Jefferson and Claiborne Counties.

Following its amendment in 1968, Section 6271-08, as herein relevant, reads:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty percent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class 3 county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county, the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under

the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal Census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U. S. Highways 49 and 51, and State Highways 16, 17 and 43 and the Natchez Trace; in any Class 4 county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal Census, traversed by U. S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect; in any county created after 1916 through which the Yazoo River flows; in any Class 4 county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a land-grant institution or lands contiguous thereto owned by the institutions; in any county lying within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal Census of 1960; in any Class 3 county wherein is partially located a national forest and wherein U. S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal Census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of Sixteen Million Six Hundred Ninety-two Thousand Three Hundred and Four Dollars ($16,692,304.00); in any Class 1 county wherein U. S. Highway 49 and Mississippi Highway 16 intersect, having a land area in excess of nine hundred thirty (930) square miles; the county superintendent of education hereafter shall be appointed by the county board of education.

In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972.

In any county which has a population of more than twenty-one thousand (21,000) inhabitants but not more than twenty-two thousand (22,000) inhabitants according to the 1960 Federal Census, and wherein the state's oldest state-supported university is located and in which Mississippi Highway 7 and Mississippi Highway 6 intersect, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972.

APPENDIX B

Statutory Language	County	Population
"Any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census;"	Washington	35,239 White 43,097 Negro 302 Other
"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole and in part by U.S. Highways 49 and 51 and State Highways 16, 17 and 43 and the Natchez Trace;"	Madison	9,267 White 23,630 Negro 7 Other
"in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U.S.Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect;"	Holmes	7,595 White 19,488 Negro 13 Other
"in any county created after 1916 through which the Yazoo River flows;"	Humphreys	5,758 White 13,300 Negro 35 Other

Statutory Language	County	Population
"in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U.S. Highway 45 and Mississippi Highway 14 intersect;"	Noxubee	4,724 White 12,064 Negro 38 Other
"in any county bordering on the Mississippi River wherein lies the campus of a land grant institution or lands contiguous thereto owned by the institution;"	Claiborne and Jefferson	14,630 White 31,440 Negro 142 Other
"in any county lying within the Yazoo Mississippi Delta Levee district, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,100) according to the Federal census of 1960;"	Coahoma	14,630 White 31,440 Negro 142 Other

Statutory Language	County	Population
"in any county having a population of twenty-six thousand, seven hundred fifty-nine (26,759) according to the 1960 Federal census and wherein U.S. Highway 51 and U.S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect;"	Lincoln	12,992 White 14,057 Negro 1 Other
"in any Class Three county wherein is partially located a national forest and wherein U.S.Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00;"	Copiah	12,992 White 14,057 Negro 1 Other
"in any county bordering on the Gulf of Mexico or Mississippi Sound having therein a test facility operated by the "National Aeronautics and Space Administration," the superintendent shall be appointed beginning January 1, 1972."	Hancock	11,784 White 2,246 Negro 9 Other

Statutory Language	County	Population
"in any Class 1 county wherein U.S.Highway 49 and Mississippi Highway 16 intersect, having a land area in excess of nine hundred thirty (930) square miles;"	Yazoo	12,862 White 18,759 Negro 32 Other
"In any county which has a population of more than twenty-one thousand (21,000) inhabitants but not more than twenty-two thousand (22,000) inhabitants according to the 1960 Federal Census and wherein the state's oldest state-supported university is located and in which Mississippi Highway 7 and Mississippi Highway 6 intersect, the county superintendent of education shall be appointed by the county board of education beginning January 1,1972."	Lafayette	14,110 White 7,208 Negro 37 Other

CERTIFICATE OF SERVICE

I certify that I have this day mailed, via United States mail, postage prepaid, copies of the foregoing Brief of Appellants, to the following:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 36

CLIFTON WHITLEY, ET AL., *Appellants,*

v.

JOHN BELL WILLIAMS, Governor of the State of Mississippi, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of Mississippi

(Three Judge Court)

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi is not reported. It is reprinted at Appendix 33. An earlier opinion in this case is reported *sub nom. Whitley* v. *Johnson,* 260 F. Supp. 630 (S.D. Miss. 1966).

JURISDICTION

This is a suit to enforce the provisions of section 5 of the Voting Rights Act against the use by Mississippi of a voting practice or procedure different from that in effect on November 1, 1964.

The judgment from which the appeal is taken was entered by the United States District Court for the Southern District of Mississippi on October 31, 1967, and the Notice of Appeal was filed in that court on October 31, 1967. On June 10, 1968, this Court set the case for hearing, consolidated it with *Fairley* v. *Patterson*, No. 25 (O.T. 1968), and *Bunton* v. *Patterson*, No. 26 (O.T. 1968), and postponed further consideration of the jurisdiction question until the hearing on the merits.

Jurisdiction below arose under 28 U.S.C. §§ 1343, 2201, 2202, and 42 U.S.C. §§ 1971(d), 1973c, and 1973j(f). A three-judge court was required by the explicit terms of section 5, 28 U.S.C. § 1973c, and a direct appeal to this Court was therefore authorized by 28 U.S.C. §§ 1253 and 1973c. Since this Court has raised and postponed the question of the three-judge court's jurisdiction, it seems appropriate to set forth appellants' position in greater detail.

In section 5, Congress took the extraordinary step of shifting to those States covered by the Act the burden of proving that any new voting practice or procedure was free from discrimination. The method of satisfying this burden is set forth in the first sentence of section 5—a declaratory judgment in the District of Columbia—as is the right of individuals not to have a new voting practice or procedure which has not been cleared enforced against their right to

vote. Following an intervening proviso, section 5 concludes by saying plainly that "any action under this section" shall be heard by a three-judge court, with a direct appeal to this Court.

Other federal jurisdictional statutes, such as 28 U.S.C. § 1331 (federal question cases) and 28 U.S.C. § 1343(4) (civil rights cases), refer to matters arising under, or relief sought under, the laws of the United States. And it has been traditionally held that the word "under" in those statutes refers not necessarily to a form of action literally specified in a statute but to a right explicitly or implicitly created by the statute.[1] Against this background the use of the broad phrase "any action under this section" in section 5 must include any action to enforce a right created by the section—including the right to prevent enforcement of a state statute not cleared in the manner specified; if Congress had meant only that "any declaratory judgment instituted by a State under this section" should be heard by a three-judge court, presumably it would have said so.

This view of the structure and the plain meaning of section 5 is supported by a glance at the considerations generally governing the jurisdiction of three-judge courts. As recently restated by this Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), "the convening of a three-judge trial court makes for dislocation of the normal structure and functioning of

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[1] See Gully v. First National Bank, 299 U.S. 109 (1936); Bill v. Hood, 327 U.S. 678 (1946); Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co., 341 U.S. 246 (1951).

the lower federal courts,"[1a] so that it should be done only where necessary "to safeguard important state interests"—e.g., to avoid "the worrisome possibilities that economic or political predilections will find their way into a judgment." 382 U.S. at 127-28.

A statute which raises these "worrisome possibilities" more clearly than section 5 can hardly be imagined. Section 5 goes to the heart of the Fifteenth Amendment, creates an extraordinary remedy to protect the basic but explosive right to vote without discrimination, and does so only in relation to a handful of states. One can hardly doubt the aptness of requiring a three-judge court to decide all questions dealing with section 5, and when one in fact sees a provision for a three-judge court written into the statute, it must require a certain kind of hardiness to suggest that that means three judges are required to put a Mississippi statute into effect, but only one is needed to block it.[2]

[1a] Quoting Justice Frankfurter in Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92 (1960) (dissenting opinion).

[2] Appellants further submit that a three-judge court was required by 28 U.S.C. § 2281, since their Complaint raised substantial constitutional questions under the Fourteenth and Fifteenth Amendments. The 1966 decision did not pass on those nor on the statutory questions. In 1967 a stipulation removed the constitutional questions from the purview of the decision on the particular motion in question. The constitutional questions remain in the case, though, and the judgment of the court below can perhaps best be analogized to a partial summary judgment. Accordingly a three-judge court was properly convened and it has not yet completed its consideration of the constitutional questions.

STATUTES INVOLVED

The statutes involved in the case are:

(1) section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [1973b(a)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of

the United States Code and any appeal shall lie to the Supreme Court."

(2) section 3260 of the Mississippi Code of 1942, as amended in 1966 by House Bill No. 68. This is the statute which appellants submit is barred by section 5 of the Voting Rights Act; its text is set forth at pages 1a-3a of this Brief, in both its prior and present versions.

QUESTIONS PRESENTED

1. Whether a state statute which makes it more difficult for voters to choose independent candidates by (a) providing that one who votes in a party primary may not be an independent candidate for public office, (b) increasing ten-fold the number of voters who must sign an indepependent candidate's petition and requiring that each voter personally sign his name and list his precinct, and (c) making the qualification date for candidates substantially earlier, is a statute dealing with "a voting qualification or prerequisite for voting, or standard, practice or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act of 1965.

2. Whether such a statute violates section 5 of the Voting Rights Act, which provides that no statute within the Act can be enforced in the absence of a declaratory judgment that the statute is free of racial discrimination or a sixty-day acquiescence by the Attorney General, neither of which occurred here.

3. Whether, if the answer to the first two questions is "yes", those 1967 Mississippi elections in which voters were deprived of the right to vote for candidates who failed to qualify solely because of the enforcement of the new tests can be allowed to stand.

STATEMENT OF THE CASE

Mississippi is subject to the Voting Rights Act of 1965, 42 U.S.C. § 1973.[3] Under section 5 of that Act, 42 U.S.C. § 1973c, if it seeks to enforce "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it must obtain a declaratory judgment that the new procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The State may also enforce the procedure if it is submitted to the Attorney General of the United States and he fails to object within sixty days.

In 1966, the Mississippi Legislature amended section 3260 of the Mississippi Code of 1942—which provides how a candidate for state office gets a place on the ballot—to make it more difficult for independent candidates to qualify for election by the voters:

(1) No person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election;

(2) the numbers of signatures of qualified electors needed on the petition of an independent candidate is substantially increased, in most cases ten-fold;

(3) each qualified elector must personally sign the petition for an independent candidate and must include his polling precinct and county;

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[3] 30 Fed. Reg. 9897 (August 6, 1965).

(4) the time for filing a petition as an independent candidate is now 60 days before party primaries rather than 40 days before the general election.[4]

It has been stipulated that the State of Mississippi neither obtained the declaratory judgment required by section 5 of the Voting Rights Act nor submitted the new test to the Attorney General before putting it into effect. See Appendix, 38.

Appellants were qualified electors and prospective independent candidates for state office in 1966 who were kept off the ballot, although they satisfied the pre-1966 provisions of section 3260, because they did not have the number of signatures required by the 1966 amendment to section 3260.[5] On October 20, 1966, appellants filed a class action on behalf of themselves and all others similarly situated, requesting an injunction against enforcement of the new procedures of section 3260 on the ground that section 5 of the Voting Rights Act barred such enforcement and that the new procedures violated the Fourteenth and Fifteenth Amendments. A three-judge district court exercised its equity jurisdiction and ordered appellants placed upon the ballot for the 1966 election, but without reaching any of the constitutional or statutory issues presented by the suit. *Whitley* v. *Johnson,* 260 F. Supp. 630 (S.D. Miss. 1966).

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[4] In 1968 this meant independent candidates had to qualify by April 5 rather than September 26.

[5] And in two cases on the additional ground that the candidate had *run* in the primary, even though the new § 3260 refers only to those who have *voted* in the primary.

In 1967, the Secretary of the State of Mississippi applied the procedures of new section 3260 to bar other members of the class represented by appellants. The record shows sixteen examples of candidates kept off the ballot. All are Negroes. These examples show that each of the procedures of the new section 3260 described above had the effect of keeping at least one candidate off the ballot in the Mississippi general elections of 1967.[6]

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[6] 1. Mrs. Fannie Lou Hamer, Sunflower, State Senate, voted in Democratic primary.
2. Philip McKinney, DeSoto, Supervisor Beat 4, filed too late.
3. Dan Lofton Mason, Hinds, Supervisor Beat 2, voted in Democratic Primary.
4. L. C. Leach, Hinds, J. P. Beat 2, Post 1, voted in Democratic Primary.
5. Rev. J. L. Brown, Hinds, Supervisor, Beat 3, voted in Democratic Primary.
6. Johnnie Ross, Hinds, J. P. Beat 3, voted in Democratic Primary.
7. John Daniel Wesley, Holmes, J. P. Beat 5, voted in Democratic Primary.
8. George Raymond, Madison, State Rep. Post 1, insufficient signatures on petition—no precincts.
9. Bennie L. Thompson, Madison, Supervisor Beat 3, insufficient signatures on petition—no percincts.
10. Ellis Saddler, Madison, J. P. Beat 3, Post 1, insufficient signatures on petition—no precincts.
11. Floyd Moore, Madison, J. P. Beat 3, Post 2, insufficient signatures on petition—no precincts.
12. H. L. Gray, Sr., Madison, Constable Beat 3, Post 1, insufficient signatures on petition—no precincts.
13. Hubert McDonald, Madison, Constable Beat 3, Post 2, insufficient signatures on petition—no precincts.
14. Rev. L. D. Coleman, Quitman, Supervisor Beat 3, filed too late.
15. Rev. Sammy Rash, Bolivar, State Rep. Post 2, no post listed on petition.
16. Harold T. Magee, Pike, Constable Beat 1, voted in Democratic primary.

Appendix 19-33.

As a result appellants moved for a permanent injunction against enforcement of the new procedures of section 3260, and in order to obtain relief in time for the 1967 elections, stipulated that the only issue before the court at that time was whether the Voting Rights Act barred enforcement of section 3260. Appendix 38-39. As so stipulated the court below took briefs and denied the injunction on the ground that the new section 3260 did not impose "a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act:

> "The Mississippi statute under consideration (House Bill 68) is directed solely to the qualifications of candidates, whereas Section 5 has reference to the qualifications of voters. We do not believe that the Mississippi statute is of the kind which Section 5 of the Voting Rights Act of 1965 was designed to prevent. The Mississippi statute under attack does not appear on its face to be one designed or intended to effect a discrimination or qualification relating to the person or voting rights of the individual. The Act does not deal with voting but deals with elections, and more particularly the candidates; therefore, it does not impinge upon Section 5 of the Voting Rights Act of 1965."

A motion presented to Mr. Justice Black for an injunction pending appeal in this Court was denied, and the 1967 general elections were held without the people of the State of Mississippi being permitted to vote for a large number of candidates who qualified under the tests of old section 3260 but not under those of the 1966 amendment. This appeal followed.

SUMMARY OF ARGUMENT

Those states, including Mississippi, which have traditionally deprived Negroes of the right to vote have displayed great ingenuity in raising new barriers of discrimination to circumvent successive checks imposed by Congress and the courts. In passing the Voting Rights Act of 1965, therefore, Congress not only barred these states from using "any test or device" as a prerequisite for voting, but also prohibited them from making any changes in their voting and election laws without first satisfying federal authorities that the changes would not have the purpose or effect of discriminating against Negroes.

The Mississippi statute involved in this case, House Bill No. 68, limited voters' opportunities to vote for independent candidates by making it more difficult for such candidates (who, as this Record shows, Appendix 19-33, would often or always be Negroes) to get on the ballot, and did so in part by provisions which limited the class of voters eligible to vote in party primaries and which required that signers of independent candidates' petitions sign personally.

The court below held that this statute was not subject to section 5 of the Voting Rights Act because it "does not deal with voting but deals with elections." Appellants submit that the Voting Rights Act does not permit such a distinction and that it is precisely statutes like House Bill No. 68 which Congress intended to submit to federal scrutiny for discriminatory purpose or effect. The terms of the Act, its purposes, its legislative history, and prior cases in related areas combine to compel the conclusion that Congress showed enough foresight to reach this newest

bold attempt by Mississippi to deny Negroes the right to cast effective votes.

ARGUMENT

Few activities in the past century have occupied the federal government and the Southern states more than attempts to enforce and evade, respectively, the guarantees of the Fifteenth Amendment.[7] In the past decade Congress itself has acted to enforce these guarantees in 1957, 1960, 1964, 1965, and now again in 1968.[8] By 1965, when the Voting Rights Act was passed, Congress had ample experience to predict, and wish to avoid, the "game of cat and mouse which the State legislatures have played for so long." 111 Cong. Rec. 10727 (Senator Tydings). The result was the trigger of sections 4 and 5, which not only outlawed the primary evil at hand—discriminatory tests and devices—but impeded the adoption of new engines of discrimination by prospectively suspending all new voting laws of the affected states—including Mississippi.

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[7] "The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, and Myers v. Anderson, 238 U.S. 368. Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268. The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, and Terry v. Adams, 345 U.S. 461. Improper challenges were nullified in United States v. Thomas, 362 U.S. 58. Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339. Finally, discriminatory application of voting tests was condemned in Schnell v. Davis, 336 U.S. 933; Alabama v. United States, 371 U.S. 37; and Louisiana v. United States, 380 U.S. 145." South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966).

[8] 42 U.S.C. §§ 1971, 1973 et seq., 1974 et seq., 2000f; Public Law 90-284 (April 11, 1968).

In House Bill No. 68, Mississippi found a sophisticated way of taking advantage of the conviction of many Negro voters that only votes for independent candidates, especially Negroes, could effectively bring responsive government.

By disqualifying prospective independent candidates from voting in party primaries (while allowing interparty cross-overs), and by multiplying voters' difficulties in getting their candidates on the ballot as independents, House Bill No. 68 went far toward nullifying the votes of Negroes whom Mississippi could no longer prevent from going to the polling places.

Appellees seek to create a distinction between voting and choosing public officers, arguing that "determination of the method by which a public official is to be elected is a matter within the inherent and exclusive jurisdiction of the states and was not in any way altered or amended by the Voting Rights Act of 1965." Motion to Dismiss or Affirm, 5-6. At the same time appellees recognize that the Act is designed to enforce the Fifteenth Amendment, and say:

> The Act does not grant the right to vote. It *only* prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed. *Id.* at 4. [emphasis added].

But the right to vote protected by the Act is not merely an abstract right to cast a ballot, but includes all steps necessary to make one's vote effective. The Act itself defines voting in section 14(c)(1):

> "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including,

> but not limited to . . . casting a ballot, and having such ballot counted." 42 U.S.C. § 1973*l*.

Moreover the reapportionment cases have confirmed the fact that, as stated in *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964):

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The legislative history too supports a broad view of the scope of section 5. Thus the Attorney General said "the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th Amendment by a State should also be subjected to judicial review."[9] Senate Hearings 237. And Senator Mansfield said:

> "FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which was precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such new qualifica-

[9] Thus the language of section 5 is clearly broader than that of section 4, and the mere fact that the applicability of section 5 depends on violations of section 4 does not mean they are the same.

> tions will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a commonsense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests takes effect." 111 Cong. Rec. 8297.

Finally, and perhaps most important, the Voting Rights Act was an attempt to enforce the guarantees of the Fifteenth Amendment fully, after earlier measures had failed. Its coverage is thus as broad as that of the Fifteenth Amendment itself. And this Court's Fifteenth Amendment cases make it clear that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939).

Thus the right to vote has been held to include choosing candidates in party primaries[10] or in primaries of private political clubs,[11] whether these primaries were administered by the State or not,[12] as well as redistricting to deny Negroes the vote in a particular municipality[13] and extending terms of incumbent

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[10] Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932).

[11] Terry v. Adams, 345 U.S. 461 (1953); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).

[12] Smith v. Allwright, 321 U.S. 649 (1944). See United States v. Classic, 313 U.S. 299 (1943).

[13] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

officials to curtail voting opportunities.[14] The right to vote comprises all these steps because each is an "integral part of the procedure of choice" of representatives. *United States* v. *Classic*, 313 U.S. 299, 318 (1943).

In *Classic* this Court went on to say that the primary 'involves a necessary step in the choice of candidates for election as representatives." 313 U.S. at 320. Choosing independent candidates, the subject of the Mississippi statute involved here, is in effect the independent voter's primary, and this Court should be slow to hold that the Voting Rights Act was not intended to protect Negro voters against a discriminatory scheme which is simply the counterpart of those which came before this Court so frequently a generation ago. Years of white domination of party primaries convinced many Negroes that their votes could not be effectively cast in such primaries, but only on behalf of independent candidates. The State of Mississippi has responded by raising the already discriminatory barriers to voting for independent candidates.[15] While this route to effective voting is not completely cut off by new section 3260, the statute does deal with voting and that alone, even without the strong suggestion here of a purpose to abridge Negroes' voting rights, is enough, under section 5, to require the state to submit the statute to federal scrutiny before enforcing it.

The only case dealing with the coverage of section 5, *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966), supports appellants' arguments here. There

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[14] Sellers v. Trussell, 253 F. Supp. 915 (M.D. Ala. 1966).

[15] In contrast to the requirements for independent candidates a party holding a primary automatically gets its candidates on the ballot, no matter how many votes were cast in the primary.

the Alabama legislature had extended for two years the terms of office of officials who had been elected at a time when Negroes were being illegally deprived of the right to vote. According to Judge Rives, the statute both violated the Fifteenth Amendment and came within section 5 since "to freeze elected officials into office is, in effect, to freeze Negroes out of the electorate."[16] If depriving Negroes of opportunities to vote, and more particularly to vote for candidates of their choice, by making elections less frequent comes within section 5, it should follow that depriving Negroes of opportunities to vote for candidates of their choice by making it difficult for these candidates—likely to be Negroes—to be on the ballot likewise comes within section 5.[17]

As to two of the provisions of the new law, the coverage of section 5 is even clearer. One change bars prospective independent candidates from *voting* in a party primary. (Nothing prevents a prospective independent from *running* in a party primary.) That such a provision deals with voting is shown by *Bowen* v. *Williams*, 238 Miss. 57, 117 So. 2d 710 (1960), where a somewhat similar statute requiring voters in primaries to abide by the primary results was held to deal with voting.

---

[16] 253 F.Supp. at 917. Judge Johnson would not have reached the question of the applicability of section 5 of the Voting Rights Act, but concurred in holding that the Alabama statute violated the Fifteenth Amendment. Since the language of both the Fifteenth Amendment and the Voting Rights Act is in terms of denying or abridging the right to vote, as discussed above, the two holdings seem to amount to the same thing. Judge Grooms dissented from both holdings.

[17] In Allen v. State Board of Elections, 268 F. Supp. 218 (E.D. Va. 1967), *juris. postponed*, No. 3 (O.T. 1968), the section 5 issue was not raised below.

A second change requires that each petitioner on behalf of an independent candidate personally sign the petition. Signing a petition to get a candidate on the ballot is the exact counterpart of voting for a candidate in a primary. Furthermore, this provision is open to the construction that handwritten signatures are required even from illiterates and, as such, clearly violates section 4 of the Voting Rights Act. 42 U.S.C. 1973b.

It need not be shown that the new provision discriminates in order to enjoin its enforcement; all that need be shown is that it deals with voting. Since at that point the federal authorities have jurisdiction, the question of what provisions do deal with voting should also be submitted to those authorities, at least in the case of provisions "arguably subject" to that jurisdiction. Compare *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245 (1959).

The proper relief here would have been to enjoin the elections affected by the state's enforcement of the statute: *Bush* v. *Martin,* 224 F. Supp. 449 (S.D. Tex. 1963), *aff'd,* 376 U.S. 222 (1964). Having sought such relief, appellants are now entitled to have all improperly-held elections set aside, *Hamer* v. *Campbell,* 358 F.2d 215 (5th Cir. 1966); *Bowen* v. *Williams, supra,*[18] and the use of the statute in subsequent elections enjoined.

[18] The new elections would not be futile jestures. In the 1967 general elections, (held after the entry of judgment below) seven Negroes won office as independent candidates.

CONCLUSION

House Bill No. 68 is no more than an inventive means of maintaining white political supremacy in Mississippi which has resulted from denying Negroes the vote for many years. Yet because the statute does not say in so many words that former slaves may not vote or that the state voting registrar may register whomever he pleases, it is claimed that this statute does not deal with a voting practice or procedure. Appellants submit that this sort of "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination" [19] was precisely what Congress expected from the State of Mississippi. Mississippi should not be allowed to thwart Congress by the devious expedient of calling a spade a shovel and saying they are different.

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[19] South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966). What this Court meant was well described by the Attorney General, testifying before the House of Representatives:

> "*Mr. Katzenbach:* The justification is simply this: Our experience in the areas that would be covered by this Bill has been such as to indicate frequently on the part of state legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. I refer, for example to the new voter qualifications that have been put into statutes of Louisiana, Mississippi and Alabama following the enactment of the 1964 Act which made things more difficult for people to vote . . . .
>
> "The same thing was true, as the Chairman may recall, in Louisiana, at the time of the initial school desegregation, where the legislature passed I don't know how many laws in the shortest period of time. Everytime the judge issued a decree, the legislature . . . passed a law to frustrate that decree." House Hearings 60.

For the reasons stated above, this Court should assume jurisdiction, reverse the judgment of the court order new elections for those plaintiffs determined on remand to be eligible, and enjoin future enforcement of House Bill No. 68.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

The text of section 3260, as it was before and after the 1966 amendment, follows. Brackets indicate material deleted by House Bill No. 68; italics indicate material added by House Bill No. 68:

3260. Ballots; what to contain.

The ballot shall contain the names of all candidates who have been put in nomination, not less than forty (40) days previous to the day of the election, by the primary election of any political party. There shall be printed on the ballots the names of all persons so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. *No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election; any independent candidate must qualify on or before the time established by statute for qualification of candidates seeking nominations in primary elections.* The commissioner shall [also] have printed on the ballot in any [general or special] election the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office *as an independent candidate* by a petition *filed on or before the statutory time* [with said commissioner not less that forty (40) days prior to the election], and signed by not less than the following number of qualified electors:

(a) For an office elected by the state at large, not less than [one thousand (1,000)] *ten thousand (10,000)* qualified electors.

(b) For an office elected by the qualified electors of a supreme court district, not less than [three hundred (300) qualified electors] *three thousand five hundred (3,500)* qualified electors.

(c) For an office elected by the qualified electors of a congressional district, not less than [two hundred (200)] *two thousand (2,000)* qualified electors.

(d) For an office elected by the qualified electors of a circuit or chancery court district, not less than [one hundred (100)] *one thousand (1,000)* qualified electors.

(e) For an office elected by the qualified electors of a county, a senatorial *district,* [or floatorial district,] *a supervisors district;* or a municipality having a population of one thousand (1,000) or more, not less than *ten per cent (10%) of the qualified electors of said county, senatorial district, supervisors district, or municipality,* or not less than *five hundred (500)* [or not less than fifty (50)] qualified electors, *whichever is the lesser.*

(f) For an office elected by the qualified electors of a supervisors district or a municipality having a population of less than one thousand (1,000) [not less than fifteen (15)] *ten per cent (10%)* of the qualified electors *of said supervisors district or municipality.*

Each elector shall personally sign said petition which signature shall not be counted unless same includes his polling precinct and county.

There shall be attached to each petition above provided for upon the time of filing with said commission, a certificate from the appropriate registrar or registrars showing the number of qualified electors appearing upon each such petition which the registrar shall furnish to the petitioner upon request.

[Unless the petition required above shall be filed not less than forty (40) days prior to the election,] *Unless the*

petition required above shall be filed not later than the time required for primary elections, the name of the person requested to be a candidate, unless nominated by a political party, shall not be placed upon the ballot. The ballot shall contain the names of each candidate for each office, and such names shall be listed under the name of the political party such candidate represents as provided by law and as certified to the circuit clerk by the State Executive Committee of such political party. In the event such candidate qualified as an independent as herein provided, he shall be listed on the ballot as an independent candidate.

Provided, however, that municipal general elections should be held in the manner provided by Section 62, Chapter 491, Laws of 1950, and the names of persons nominated in the primary elections in muncipalities, as provided by section 63 of said chapter 491, Laws of 1950, shall be placed upon the ballot in such general municipal elections, notwithstanding any limitation of time which may be otherwise imposed herein.

Provided further, however, that nothing in this act shall prohibit special elections to fill vacancies in either house of the legislature from being held as provided in Section 3295, Mississippi Code of 1942, as amended. And in all elections conducted under the provisions of Section 3295 the commissioner shall have printed on the ballot the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office by a petition filed with said commissioner not less than five (5) days prior to the election, and signed by not less than fifty (50) qualified electors.

SUPREME COURT, U. S.

SEP 6 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 3

RICHARD ALLEN, ET AL.,

Appellants,

v.

STATE BOARD OF ELECTIONS, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

BRIEF ON BEHALF OF APPELLEES

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Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

BRIEF ON BEHALF OF APPELLEES

PRELIMINARY STATEMENT

On November 26, 1966, appellants instituted in the United States District Court for the Eastern District of Virginia this suit for preliminary and permanent injunctions allegedly to restrain the enforcement, operation and execution of Section 24-252 of the Code of Virginia (1950) by restraining the defendant election officials and their successors in office from failing or refusing to count, and from requiring or permitting any other election officials to fail or refuse to count, any vote hereafter given for any person solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter.

Jurisdiction was invoked under 28 U.S.C.A. 1331 and 1343(3), (4); the Voting Rights Act of 1965, 42 U.S.C.A. 1973 *et seq.*; the Fourteenth Amendment to the Constitution of the United States and 28 U.S.C.A. 2281 and 2284—the latter two statutes providing for the convening of a District Court of three judges to hear and determine suits in which restraint of the enforcement of a State statute, upon the ground of such statute's constitutionality, is sought.

A District Court of three judges having been designated by the Chief Judge of the United States Court of Appeals for the Fourth Circuit, the matter was heard on the merits on April 11, 1967. Subsequently, the District Court rendered its opinion denying the prayer of appellants' complaint and dismissing the suit. See, *Allen* v. *State Board of Elections*, 268 F. Supp. 218. On May 2, 1967, a final order effectuating this opinion was entered (App. 73a), from which an appeal to this Court was noted on June 29, 1967 (App. 3a, 74a).

On June 10, 1968, this Court entered its order postponing further consideration of the question of jurisdiction in this case to the hearing on the merits and placing the case on the summary calendar (App. 80a).

STATEMENT OF THE CASE

Appellants are citizens of the Commonwealth of Virginia. registered to vote in one of the precincts or wards of one of the several counties and cities comprising the Fourth Congressional District of Virginia, who are unable to spell accurately or write legibly. Appellees are the State Board of Elections of the Commonwealth of Virginia and various individuals who were, on November 8, 1966, either judges or clerks of election in certain precincts located in Greensville County, Cumberland County and Powhatan County, Virginia.

Appellants allege that, at the general election held on November 8, 1966, they were furnished official ballots on which were printed the names of two candidates for election to the House of Representatives of the United States from the Fourth Congressional District of Virginia. They further allege (1) that they inserted the name "S.W. Tucker" on the official ballot, immediately under the names of the two candidates printed thereon, by pasting on the official ballot a sticker or paster upon which the name "S. W. Tucker" had been printed and (2) that they made a check, cross mark or line on the ballot immediately preceding the name thus inserted and thereafter deposited such ballots in the ballot boxes. The ballots thus altered or marked were not officially counted or included in the official returns as votes validly cast for the said S. W. Tucker.

On August 6, 1965, the Voting Rights Act of 1965 (Public Law 89-110, 79 Stat. 437) enacted by the Congress of the United States became effective in Virginia. This Act had the effect of suspending literacy tests and similar voting qualifications throughout the Commonwealth for a specified period by prescribing that no person might be denied the right to vote in any election because of his failure to comply with a "test or device" as defined by the statute. As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any class.

On August 12, 1965—within a week of the effective date (August 6, 1965) of the Voting Rights Act of 1965—the Honorable Levin Nock Davis, Secretary of the appellee State Board of Elections, sent to all registrars of

the Commonwealth of Virginia a bulletin advising them that the Voting Rights Act of 1965 was in force in Virginia and that use of the Virginia registration form in the manner formerly required by Virginia law was prohibited. The above-mentioned bulletin contained the following instructions:

> "The Registrar shall review the forms in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely, or if the applicant is not able personally to complete the forms in whole or in part because of lack of literacy or otherwise, or has difficulty in doing so, the Registrar shall orally examine the applicant and record the pertinent information on the forms or otherwise assist the applicant in completing the forms. After the forms are completed, the Registrar shall require the applicant to take an oath or affirmation as to the truth of the answers and to sign his name or make his mark thereon."

Subsequently, on October 15, 1965 Mr. Davis also sent to the general registrars and the secretaries of the various electoral boards throughout the Commonwealth—to be delivered by the latter to all judges of election—a further bulletin which informed and instructed all judges of election that:

> "On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of elec-

tion selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

"These instructions also apply to precincts in which voting machines are used."

The instructions contained in the above-mentioned bulletins continue in full force in the Commonwealth so long as the Voting Rights Act of 1965 remains effective in Virginia.

THE STATUTES INVOLVED

Under consideration in the instant proceedings are Sections 24-251 and 24-252 of the Code of Virginia (1950) as amended which provide:

"§ 24-251.—Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may, if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months."

"§ 24-252.—At all elections except primary elections

it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

QUESTION PRESENTED

Is Section 24-252 of the Virginia Code, as implemented by the regulations of the State Board of Elections, violative of the Fourteenth Amendment to the Constitution of the United States or the Voting Rights Act of 1965?

SUMMARY OF ARGUMENT

Denial of the relief requested by appellants in the trial court and made the subject of their appeal in this case presents no question for consideration by this Court. In essence, appellants seek (1) a judgment declaring that the challenged Virginia statute is invalid to the extent that it purports to deny any voter—*solely because of his inability to write*—the privilege of casting a "write-in" ballot, and (2) an injunction restraining appellees from refusing to count votes cast for any person solely because the name of such person was inserted on the ballot *otherwise than in the handwriting of the voter*. However, the statute in question, as implemented by the regulations of the State Board of Elections, (1) does not purport to deny any person the privilege of casting a "write-in" vote upon such grounds and (2) does not permit appellees to refuse to count a "write-in" vote upon such grounds. On the contrary, "write-in" votes cast in accordance with the regulations of the

State Board of Elections are required to be counted, even though not in the handwriting of the voter. Thus, the denial of the requested relief does not present an issue for consideration by this Court.

The refusal of appellees to count "write-in" votes attempted to be cast by means of stickers or pasters infringes no rights secured to the appellants by the Fourteenth Amendment. The question of whether or not "write-in" votes may be cast in this manner is one for legislative determination, and Virginia law does not permit anyone to vote in this fashion, regardless of the physical or educational condition of the voter. This law is a reasonable expression of the will of the General Assembly of Virginia, does not discriminate against any individual or class of individuals and is not antagonistic to the Fourteenth Amendment.

Nor is the statute under attack violative of the Voting Rights Act of 1965. Under present Virginia law, as implemented by the regulations of the State Board of Elections, educationally handicapped voters may cast "write-in" votes by enlisting the assistance of a judge of election, and no citizen of Virginia is denied the right to vote in any election held in the Commonwealth because of his failure to comply with any "test or device" within the meaning of the Voting Rights Act. The regulations of the State Board of Elections in the case at bar implement the Voting Rights Act of 1965 in a manner which precisely conforms to the relief granted by various United States District Courts under the Voting Rights Act, and the election laws of Virginia, as thus implemented, are fully consistent with all requirements of Federal law.

Finally, the regulations of the State Board of Elections do not constitute a "practice or procedure" within the scope of Section 5 of the Voting Rights Act which requires prior scrutiny and approval of the Attorney General of the United States or the United States District Court for the District

of Columbia. On the contrary, such regulations were necessary in order to implement the Voting Rights Act which became effective on August 6, 1965, and was *then* in force in Virginia. If such regulations could not be put into effect without such prior scrutiny and approval, the effectiveness of the entire Voting Rights Act would be suspended pending receipt of such approval, and the Voting Rights Act contains no language evidencing a Congressional intent to delay the effectiveness of the Federal statute until such permission is first obtained.

ARGUMENT

Section 24-252 Of The Virginia Code, As Implemented By The Regulations Of The State Board of Elections, Is Not Violative Of The Fourteenth Amendment To The Constitution Of The United States Or The Voting Rights Act of 1965.

I.

JURISDICTION

In the instant case, it is important to realize at the outset that the Virginia statute under attack by appellants—Section 24-252 of the Virginia Code—*has been superseded by the Voting Rights Act of 1965.* With the advent of the Voting Rights Act, which suspended in Virginia any requirement that a voter be able to read, write or understand any matter in registering to vote or in voting, the requirement of Section 24-252 that the inserted name of a "write-in" candidate be in the handwriting of the voter was superseded and was no longer enforceable or enforced in Virginia.

Equally important is it to realize that the above-stated propositions *were conceded by appellees in this case from the beginning,* and no attempt whatever was made to assert the efficacy of the challenged enactment in this regard. On

the contrary, appellees established in evidence and emphasized in argument that within a week of the effective date of the Voting Rights Act of 1965—and before the case of *South Carolina* v. *Katzenbach*, 383 U. S. 301, was even instituted in this Court—the appellee State Board of Elections issued a bulletin instructing all registrars to register all persons who were unable themselves to register because of a lack of literacy. (App. 60a). The language in which this bulletin was couched was transposed almost verbatim from the Federal regulations implementing the Voting Rights Act, and the substantial identity of language clearly indicates that every effort was made to conform the applicable Virginia law precisely to the requirements of the Federal statute.[1] In addition, on October 15, 1965—some three weeks before the first general election held in Virginia after the effective date of the Voting Rights Act—the defendant State Board of Elections sent to all general registrars and to all secretaries of the various local electoral boards for transmittal to all judges of elections, a further

[1] FEDERAL REGISTER, VOLUME 30—NUMBER 152, August 7, 1965, Title 45—Chapter 8, CIVIL SERVICE COMMISSION, PART 801—VOTING RIGHTS PROGRAM.

§ 801.203. *Procedures for filing application.*

(a) An applicant may obtain an application at the place and during the times set out in Appendix A for the appropriate political subdivision. An application may be completed only at the place where it was obtained and shall be submitted by the applicant in person to an examiner at that place.

(b) An examiner shall review the application in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely or if an applicant is not able personally to complete the application in whole or in part because of lack of literacy or otherwise, or has difficulty in doing so, an examiner shall orally examine the applicant and record the pertinent information on the application or otherwise assist the applicant in completing the application.

(c) After an application is completed, an examiner shall require the applicant to take the oath or affirmation prescribed on the application and to sign his name or make his mark thereon.

bulletin instructing all judges of elections to render assistance to any voter who was unable to mark or cast his ballot, in whole or in part, because of a lack of literacy. (App. 64a). As the District Court noted, the instructions contained in these bulletins continue in full force in the Commonwealth so long as the Voting Rights Act of 1965 remains effective in Virginia (App. 72a).

Despite the requirement of the challenged statute that the inserted name of a "write-in" candidate be placed on the ballot in the handwriting of the voter, provision is made, by reference to Section 24-251 of the Virginia Code—for the assistance of physically handicapped voters by the judges of election, who are (1) authorized by the latter provision to assist a physically handicapped voter "in the preparation of his ballot in accordance with" the instructions of the voter and (2) forbidden, under penal sanction, from divulging or indicating in any manner, by sign or otherwise, the name or names of the persons for whom any physically handicapped voter cast his ballot. When the Voting Rights Act of 1965 became effective in Virginia, the provisions of Section 24-251 of the Virginia Code were broadened by the instructions of the State Board of Elections to include the educationally handicapped as well as the physically handicapped within the provisions permitting assistance, and thus render Virginia law consistent with the commands of the Federal statute. These instructions of the State Board of Elections removed from the operative Virginia law any requirement that a person be able to comply with any "test or device" as defined in the Voting Rights Act.

So far as the jurisdictional aspect of the instant appeal is concerned, counsel for appellees believe it important to consider the appellants' appeal in light of the above-canvassed status of the Virginia election laws existing when

this suit was instituted. The relief sought by appellants in their complaint is specified in paragrahs B(1), B(2) and B(3) of their prayers for relief. (App. 9a-10a). The injunction requested in paragraph B(2) related solely to the counting of votes cast in the general election held on November 8, 1966—some six months before the case was heard. This request was not pressed at the hearing, was not included in appellants' subsequent motion for summary judgment (App. 66a) and denial of this relief is not a subject of this appeal. See, Plaintiffs' Notice of Appeal, (App. 74a). Indeed, appellants acknowledge (Brief for Appellants, p. 13):

> "By their subsequent motion for summary judgment which asked for relief under prayers B(1) and (3) of the complaint, appellants indicated that they mainly sought relief for future elections and not for the 1966 election (A. 66a)."

Specifically, appellants' appeal from the final order of the District Court entered on May 2, 1967, "whereby prayers B(1) and (3) of the plaintiffs' complaint for a declaratory judgment and injunctive relief were denied and said complaint was dismissed." (App. 74a). In this connection, prayer B(1) of the complaint requested (App. 9a-10a):

> "That the Court enter a judgment declaring that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and also that the Voting Rights Act of 1965, invalidates so much of Section 24-252 of the Code of Virginia, 1950, as amended *as purports to deny any voter, solely because of his inability to write,* the privilege of casting a secret ballot for a person whose name is not printed on the official ballots and having such ballot counted in the appropriate returns; such privilege having been reserved to voters generally by Section 28 of the Constitution of Virginia." (Italics supplied.)

In the trial court, appellants were wholly unable to establish any foundation for this relief, since appellees admitted that the provisions of Section 24-252 of the Virginia Code which required the name of a "write-in" candidate to be inserted on a ballot in the voter's own handwriting had been superseded by the Voting Rights Act of 1965 and was no longer enforceable in Virginia. No controversy whatever existed between the parties on this point, and no litigable issue —no present clash of contending legal interests—was presented to the District Court for resolution by this feature of the complaint. Indeed, appellees established by their undisputed evidence that no attempt was being made to enforce this aspect of the challenged statute and that regulations issued by the State Board of Elections implementing the Voting Rights Act of 1965 made it clear that no "write-in' vote was to be rejected solely because such vote was not in the handwriting of the voter. Quite to the contrary, provision had been made by such regulations for assistance to be rendered to educationally handicapped voters wishing to cast "write-in" votes, and votes of educationally handicapped persons cast in accordance with such regulations were required to be counted, even though not in the handwriting of the voter. Clearly then, the denial of the relief here under discussion does not present a question for consideration by this Court.

Equally manifest is it that denial of relief requested in prayer B(3) of the complaint presents no such question. The specific relief sought by this paragraph was (App. 10a):

> "That this Court enjoin and restrain the State Board of Elections and the other defendant election officials and their successors in office from failing or refusing to count and from requiring or permitting any other election official to fail or refuse to count any vote here-

> after given for any person *solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter.*" (Italics supplied.)

In the trial court, of course, it was unquestionably established that no Virginia election official *had refused,* or was *required* to refuse or was *permitted* to refuse to count any vote given for any person "solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter." Votes of educationally handicapped voters cast for a candidate whose name was inserted on the ballot in accordance with the regulations of the State Board of Election were required to be counted, even though not in the handwriting of the voter. Thus, according appellants this requested relief would have been superfluous for at least two reasons: (1) it would have enjoined Virginia election officials from actions which they were not permitted by Virginia law to take, had not taken and did not propose to take and (2) it would not have affected the action of Virginia election officials in refusing to count "write-in" votes cast by means of stickers or pasters, since such votes could still be rejected by such officials, even after entry of the requested injunction, without violating the terms of the injunctive order. For these reasons, counsel for appellees submit that the denial of the relief requested in paragraph B(3) of the complaint presents no issue for consideration by this Court.

II.

The Fourteenth Amendment

The General Assembly of Virginia has enacted a comprehensive body of law governing the conducting of elections throughout the Commonwealth which comprises Title 24

of the Code of Virginia (1950) as amended. With particular reference to the case at bar, Virginia law does not permit stickers or pasters to be utilized by voters in casting or marking their ballots under any circumstances—regardless of the physical or educational condition of the individual voter. On October 6, 1936, and again on October 18, 1943, the then Attorney General of Virginia, Abram P. Staples (later a Justice of the Supreme Court of Appeals of Virginia) *ruled* that the utilization of stickers or pasters would be violative of Section 27 of the Virginia Constitution providing for the secrecy of the ballot and was thus prohibited. See; Reports of the Attorney General of Virginia (1936-1937) pp. 63-65; (1943-1944) p. 48. In this connection, Judge Staples declared, Report of the Attorney General of Virginia (1943-1944) p. 49:

> "1. Your first question is whether it is permissible for a voter to use a sticker, consisting of a small strip of paper, upon which has been written or printed the name of a candidate for office for whom he desires to vote, and insert same by pasting it on the ballot at the appropriate place. I find that I had occasion to express my views on this question in an opinion given October 6, 1936, to the chairmen of the electoral boards of the cities of Norfolk and Portsmouth, and of the county of Norfolk. Since that opinion answers your question I quote the same as follows:
>
> " 'The third question is whether or not it is permissible for a voter to use a small sticker with the name of the candidate already checked which the voter may paste on the ballot.
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> " 'It is my opinion that the addition of a sticker to the ballot constitutes adding thereto other material in the form of paper in addition to the actual ballot itself. No such practice has ever prevailed in Virginia. The pasting on of the additional strip of paper might not be permanent, as it is frequently the case that papers

> pasted together come apart and that stamps often come off envelopes. I am further of the opinion that the pasting of a sticker could be readily detected by the judge of election at the time the ballot is handed to him, as is required by law, to be deposited in the ballot box, and that voting in this manner would be in violation of the provision of the State Constitution providing for the secrecy of the ballot.' "

The view expressed by Judge Staples on these occasions has never been altered by the General Assembly of Virginia. Yet, in the case at bar, for some reason not readily apparent to the appellees, counsel for appellants now seem to assert that Section 24-252 of the Virginia Code—to the extent that it forbids them to utilize stickers or pasters in casting their ballots—infringes rights secured to them by the Fourteenth Amendment.

Initially in this connection, it is significant that no case supportive of appellants' contention can be found. As the District Court pointed out (App. 69a):

> "The plaintiffs' contention that Section 24-252 violates the Fourteenth Amendment because its discriminates against illiterates is not supported by authority."

However, as the District Court also noted, there is no want of authority upon this point, and decisions sustaining and justifying a legislative determination to forbid the use of stickers or pasters are legion. In this connection, the District Court observed (App. 68a):

> "The propriety of stickers is a matter for legislative, not judicial determination. *Arguments for and against their use abound. Stickers have been lauded for facilitating voting and denounced as conducive to fraud and confusion.* Their use has been approved under statutes permitting write-ins, Pace v. Hickey,

> 236 Ark. 792, 370 S.W. 2d 66 (1963); O'Brien v. Board of Elections Comm'rs, 257 Mass. 332, 153 N.E. 553 (1926); Dewalt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771 (1892); State on Complaint of Tank v. Anderson, 191 Wis. 538, 211 N.W. 938 (1927). Illinois forbade their use, Fletcher v. Wall, 172 Ill. 426, 50 N.E. 230, 40 L.R.A. 617 (1898), and the constitutionality of this ban has been upheld. Blackman v. Stone 101 F. 2d 500, 504 (7th Cir. 1939). (Italics supplied.)

Squarely in point is the decision of the United States Court of Appeals for the Seventh Circuit in *Blackman* v. *Stone*, 7 Cir., 101 F. (2d) 500. That case was a class action by certain residents of Illinois challenging various provisions of the election laws of that State. In a series of decisions, the Supreme Court of Illinois had held that the use of stickers or pasters by voters was forbidden. See, *McSorley* v. *Schroeder, supra; Roberts* v. *Quest*, 173 Ill. 427, 50 N.E. 1073; *Fletcher* v. *Wall, supra.* In the *Blackman* case, plaintiffs contended, *inter alia*, that this provision of the Illinois law was violative of the Fourteenth Amendment. Rejecting this contention the Court declared (101 F. (2d) at 504):

> "It is further contended by appellants that section 288 of the law is invalid because it requires all voters to vote by printed ballots furnished by the State and forbids the use of other ballots or pasters. There is no merit in this contention. *The section is a reasonable expression of the will of the Illinois Legislature and is not in any manner inconsistent with any provision of the Federal Constitution.* (Italics supplied.)"

A brief canvass of the more pertinent and comprehensive of the State court decisions sustaining the validity of statutes forbidding the use of stickers or pasters readily furnishes

the justification for such a legislative determination. In *Fletcher* v. *Wall*, 172 Ill. 427, 50 N.E. 230, the Supreme Court of Illinois sustained a determination of the board of canvassers of a village election rejecting and refusing to count ballots to which paster tickets had been attached. Holding that the use of such pasters was "violative of the spirit and intent of the Election law of this State", the Court observed (172 Ill. 430, 432-433, 50 N.E. 231-232):

> "It is true that, in order that no voter shall be deprived of the right to cast his ballot for whomsoever he will for any office, he is authorized by section 23, when the name is not printed thereon, to prepare his ballot by writing the name of the candidate of his choice in a blank space on said ticket, making an × opposite thereto. It is, however, plainly prescribed by the statute that the ballot furnished by the judges to the voter must be prepared by him individually, after he enters the booth, *except in so far as he may be assisted as an illiterate voter, under the provisions of section 24, and that he shall be allowed to do so uninfluenced or in any way controlled by being electioneered or furnished with tickets or pasters by outsiders.*
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> * * *
>
> *"Under the method here adopted they could furnish the ticket as they desired it to be voted, marked, or with instructions to the voter how to mark it, and by the same methods induce him to attach it, as furnished, to the official ballot, and then procure it to be deposited in the ballot-box. The manner of voting prescribed by the act is thereby wholly changed and the secrecy of the ballot entirely destroyed."* (Italics supplied.)

Subsequently, in the later case of *McSorley* v. *Schroeder*, 196 Ill. 99, 63 N.E. 697, the Supreme Court of Illinois reaffirmed the views expressed in *Fletcher* v. *Wall, supra*, in the following language (63 N.E. at 700):

"*It does not follow that* because, under the provisions of section 23, the voter may prepare his ballot by writing the name of the candidate of his choice in a blank space on the said ticket, *he may also indicate his choice by pasting a printed name on the ticket.* Such pasting of the name does not come within the meaning of the words 'writing in the name of the candidate of his choice in a blank space on said ticket.' Fletcher v. Wall, supra. In Roberts v. Quest, supra, we held that under the election law of 1891, *a voter has no authority to insert the name of the candidate of his choice on the official ballot by using a paster, on which the name of such candidate is printed*: and we there said: 'It is, however, plainly prescribed by the statute that the ballot furnished by the judges to the voter must be prepared by him individually, after he enters the booth, except in so far as he may be assisted as an illiterate voter, under the provisions of section 24, and that he shall be allowed to do so uninfluenced or in any way controlled by being electioneered or furnished with tickets or pasters by outsiders. * * * *It is manifest that, if pasters may be resorted to by one candidate, they may be by all, and the official ballot might become but little more than a convenient card upon which to paste private tickets printed and circulated in secret. The use of such tickets would revive the evils sought to be guarded against by the ballot law.*'" (Italics supplied.)

Indeed, two of the cases cited by appellants contain dissenting opinions which furnish abundant support for the rationality and desirability of a statutory scheme which forbids the use of pasters or stickers. Dissenting from the opinion of the majority in *State* v. *Anderson*, 191 Wis. 538, 211 N.W. 938, which held that Wisconsin law permitted voters to use stickers in casting their ballots, two Justices of the Supreme Court of Wisconsin pointed out (211 N.W. at 940, 942):

"As stated in the opinion of the court, after the Australian ballot law was enacted, it was expressly provided that the voter, while in the election booth, could use stickers or pasters in voting, by pasting a slip with the name of the voter's choice on the ballot over the name of the candidate printed thereon. *But that plan evidently did not prove satisfactory, probably for the reason that it permitted one of the abuses prevailing prior to the adoption of the Australian ballot which, as stated by the Supreme Court of Michigan, was:*

" 'Secret organizations met on the night previous to election, and furnished their members with 'vest-pocket' tickets—a proceeding foreign to the spirit of our government.' Detroit v. Rush, 83 Mich. 532, 46 N.W. 951, 10 L.R.A. 171.

"The sticker or paster was substituted for the 'vest-pocket' ticket, and was subject to the same objection. (Italics supplied.)

* * *

Similarly, in the recent (1963) case of *Pace* v. *Hickey*, 236 Ark. 792, 370 S.W. (2d) 66, Chief Justice Harris dissented from so much of the opinion of the majority of the Supreme Court of Arkansas as perpetuated the use of stickers or pasters under Arkansas law and, during the course of his opinion, made the following forceful observations (370 S.W. (2d) at 68-69):

"I believe that the use of stickers makes fraud easier to perpetuate. If a voter does not care to vote for anyone in a particular race, he will make no mark on the ballot at all, and there is nothing to prevent an unscrupulous judge or clerk at an election from reaching into his pocket and placing a paste-on vote on such a ballot. It would be indeed difficult to establish that this paste-on vote was placed on the ballot by someone other than the voter—but, if we stay with the statute, the way is clear to eventually determine whether the voter

cast that vote, *i.e.*, through an examination of the handwriting.

"*However, there is, in my view, an even better reason for holding paste-on votes invalid, viz., the use of the stickers destroys the secrecy of the ballot.* Most people like to maintain secrecy in casting their votes; they desire to express themselves at the polls without fear of losing someone's good will, or business. Frequently, the voter may be friendly to both candidates, or both may be good customers, and he desires to maintain that friendship, or business, after the election. *He is entitled to cast his vote free from duress, and without fear of retaliation.* In most instances, at a general election, there would probably only be a single race where a 'write-in' candidate would go to the trouble and expense of preparing stickers in advance. (This has been the case in previous elections where such stickers were used.) When the voter approaches the polls, he is likely besieged and beseeched—by those offering the stickers. Let it be borne in mind that the offer of a sticker is entirely different from merely offering campaign literature, for a voter ostensibly could have but one purpose in taking a sticker—that purpose being to use it after he enters the polling booth. If he refuses to take a sticker, he is immediately marked by the person offering it—and by bystanders—as a voter who will cast his vote for the man whose name is already printed on the ballot. If, on the other hand, he takes the sticker, by-standers mark him as one who intends to cast his vote for the 'write-in' candidate—also he would not have taken the sticker. Actually, the voter might accept the sticker as a matter of avoiding embarrassment—but he is still labeled by those viewing the incident as a supporter of the write-in candidate. In addition, the voter's use of the sticker can certainly be detected after he enters the polling both, and prepares to cast his vote. One needs only to glance around to identify those who are pasting stickers on the ballots. *The secrecy of the ballot is thus utterly and completely destroyed.*" (Italics supplied.)

Finally, a mere reference to the contested election case which the use of stickers or pasters presented to the Supreme Judicial Court of Massachusetts in *O'Brien* v. *Board of Election Comr's.*, 257 Mass. 332, 153 N.E. 553, is sufficient to demonstrate the numerous and difficult problems which this method of voting may proliferate. Commenting upon the situation there presented, the Court stated (153 N.E. at 555):

> "There was not a single designation of office to be voted for where a paster had not been placed. Some were attached between the various groups for the different offices, others in the corner, on the top, on the bottom, on the margin, and on the back of the ballot. Some were put on horizontally, others diagonally, vertically, upside down, and, in one instance a portion only of the paster was used. On many of the disputed ballots there was no cross or mark at the end of the paster or on the ballot at either end of the paster."

In that case, the use of pasters or stickers gave rise to no less than seven different categories of votes, each of which necessitated independent consideration by the Court to determine whether the votes in each case should be counted at all and, if so, for what candidate.

In light of the views expressed in the above-canvassed decisions, it is clear that the challenged statute forbidding the use of stickers or pasters in Virginia is not arbitrary or capricious but is, indeed, a reasonable, wise and desirable provision which contributes to the purity of elections, uniformity in voting and the secrecy of the ballot throughout the Commonwealth. Indeed, as the District Court expressly pointed out (App. 70a):

"No evidence has been presented that Virginia's prohibition of stickers has been administered in a discriminatory manner. It has not been used to disfranchise any class of citizens. We conclude that § 24-252 does not violate the Fourteenth Amendment by discriminating between literate and illiterate voters." (Italics supplied.)

III.

The Voting Rights Act of 1965

In light of the present status of the election laws of Virginia previously emphasized in this brief, it is difficult to conceive how appellants can assert that they are now required to be able to read or write in order to vote in Virginia, or that they are denied the right to vote for failure to comply with any test or device as defined in the Voting Rights Act of 1965. On the contrary, since the advent of the Voting Rights Act, Virginia law has made ample provision for the educationally handicapped voter to register and cast his ballot, and no citizen of Virginia, otherwise eligible to vote, is denied the right to vote in any election held in the Commonwealth because of his failure to comply with any "test or device" within the meaning of the Voting Rights Act. Precisely in this connection, the District Court declared (App. 72a):

"The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. § 1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. *Under present Virginia statutes and regulations of the Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled."* (Italics supplied.)

The conclusion of the District Court in the case at bar is fully consistent with that reached by other Federal courts in which the question has been considered. In *United States* v. *Executive Committee,* 254 F.Supp. 543, the United States District Court for Alabama noted with approval the provisions made by State law for the casting of ballots by the educationally handicapped in the following language (254 F.Supp. at 546):

> "At Title 17, Section 359, Code of Alabama, the procedure for assistance to voters who are unable to read when voting by paper ballot is stated. Title 17, Sec. 107, Code of Alabama, gives the procedure in such an instance when voting is conducted by machine. In essence, the statutes provide that the person who is unable to read or mark his ballot *may request assistance* and take an oath, attesting to his incapacity, *and then the two officials shall proceed to assist the voter.*
>
> "It therefore appears that the right to a secret ballot provided by the State of Alabama is subject to certain practical limitations where such secrecy is impossible, *as in the case of an illiterate asking assistance* or a person voting by absentee ballot." (Italics supplied.)

Similarly, in *United States* v. *State of Mississippi,* 256 F.Supp. 344, a three-judge District Court for the Southern District of Mississippi expressly decreed (256 F.Supp. at 349):

> "'It is the duty and responsibility of *the precinct officials* at each election to provide *to each illiterate voter who may request it* such reasonable assistance as may be necessary to permit such voter to cast his ballot in accordance with the voter's own decision." (Italics supplied.)

In *Morris* v. *Fortson,* 261 F.Supp. 538, plaintiffs claimed to represent certain illiterate voters whose rights as electors

under the Federal Constitution and the Voting Rights Act of 1965 were alleged to have been infringed by those provisions of Georgia law which prohibited the use of stickers or stamps in casting "write-in" ballots. Rejecting this contention, the three-judge District Court for the Northern District of Georgia declared (261 F.Supp. at 540):

> "We hold that these Code Sections prohibiting the use of stamps or stickers are not unconstitutional or proscribed by the Voting Act of 1965 on their face. We also hold that they are not unconstitutional in application in view of what is hereafter said concerning assistance available to the illiterate voter under the Georgia law.
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> [3] It is settled that illiterate voters may be rendered assistance. Katzenbach v. Morgan, 1966, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828. Indeed, illiterate voters *must* be rendered assistance in order to effectuate their constitutional right to vote."

Finally, in *United States* v. *State of Louisiana*, 265 F.Supp. 703, a three-judge District Court for the Eastern District of Louisiana, granting relief under the Voting Rights Act of 1965, ordered "election commissioners to give assistance to voters who are unable to read and write." Id. at 708. The relief granted in that case so precisely conforms to that authorized by the regulations of the State Board of Elections in the case at bar as to merit reproduction of certain provisions of the Court's order at length (265 F.Supp. at 709, 712):

> "It is hereby ordered, adjudged, and decreed that the defendants and their agents, *including parish registrars of voters and all parish, municipal and state primary and general election officials* and their officers, employees, and successors, and all those in active concert and participation with them, be and hereby are permanently enjoined from:"
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> * * *

"c. *Failing to provide* at the polls during each federal, state, parish, and municipal election held in the State of Louisiana, including all primary elections, *assistance to each voter who because of inability to read or write needs assistance* in the operation of any mechanical voting device or in marking his ballot so that his vote be properly cast for the candidates and issues of his choice."

* * *

"A voter who declares *to a commissioner* that he is unable to read or write, shall receive the assistance *of a commissioner of his own selection* in the casting of his ballot. *The Commissioner shall* ascertain the wishes of the voter and *cast the assisted voter's ballot* accordingly. A commissioner shall first, however, require the voter to make a declaration of inability under oath. No person shall swear falsely in order to obtain assistance. Whenever a voter receives assistance, the commissioners in charge of the poll lists shall write the voter's name in the list and shall write in the column of remarks on the poll list opposite the name of the voter the words 'assisted and sworn.' No voter shall ask for or receive assistance from an unauthorized person. No person who is not a commissioner shall volunteer to assist a voter in physically casting his ballot. When a voter calls a commissioner to assist in casting his ballot, one other commissioner, if any, supporting a candidate opposing the elector's preferred candidate, shall enter the polling booth and view the casting of the ballot, *but no other person except commissioners shall give assistance* nor shall any person other than a commissioner at any time enter a polling booth while another voter is in the booth. *No commissioner shall make known the way an assisted voter casts his ballot, or cast the ballot contrary to the instructions of the voter. Nothing in this order affects assistance to blind or physically disabled voters.*" (Italics supplied.)

Counsel for appellees submit that the relief awarded in *United States* v. *State of Louisiana, supra,* in 1966 could easily have been copied from the regulations issued by the Virginia State Board of Elections in 1965. And, of course, the decision in that case was expressly affirmed by this Court. *Louisiana* v. *United States,* 386 U.S. 270. It is thus unarguably apparent that no citizen of Virginia, otherwise qualified to vote, is denied the right to vote in any election held in the Commonwealth because of his failure to comply with any "test or device" as defined in the Voting Rights Act of 1965. Indeed, it is clear that the election laws of Virginia as interpreted and applied by the appellee State Board of Elections since the Voting Rights Act of 1965 became operative in the Commonwealth are fully consistent with all requirements of Federal law.

IV.

Submission of Regulations Under Section 5 Of The Voting Rights Act of 1965

The contention that the regulations of the State Board of Elections under consideration in this case were required to be submitted to the Attorney General of the United States or the United States District Court for the District of Columbia before they could be put into effect fares no better in the hands of the appellants than it did in those of the Solicitor General who initially framed the contention in his Memorandum For The United States. In this connection, the Solicitor General (and now appellants) asserts that regulations of this character, particularly those issued on October 15, 1965, constitute a "practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" within the meaning of Section 5 of the

Voting Rights Act, 42 U.S.C. 1973c, and states that it "would appear to follow that the new requirement could not be used without first passing the scrutiny of either the Attorney General or the United States District Court for the District of Columbia." See, Memorandum for the United States, pp. 6-7. The latter statement is referable to that portion of Section 5 of the Voting Rights Act which suspends the efficacy of any State voting regulation promulgated after November 1, 1964, unless there has been (1) submission of the rule to the Attorney General, in which case it may be used if no objection is interposed within sixty days; or (2) a declaratory judgment from the United States District Court for the District of Columbia that the rule "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . ." See, Memorandum for the United States, p. 6; cf. Brief for Appellants, pp. 57-59.

This assertion of the Solicitor General is accorded only a half-hearted reception by the appellants, and rightly so, for the invalidity of the Solicitor General's position is easily demonstrable. If the instructions issued in the case at bar were subject to the provisions of Section 5 of the Voting Rights Act, it necessarily follows that a State to which the Act applies could not adjust its procedures to comply with the requirements of the Federal law until they received permission to do so from the Attorney General or the District Court for the District of Columbia. The Solicitor General's assertion overlooks the fact that the instructions under consideration were not promulgated to alter Virginia law as such, but were required to implement the Voting Rights Act which became effective on August 6, 1965. The Solicitor General's contention impels the conclusion that the Voting Rights Act, which became law on August 6, 1965, could not

be made effective in practice without the prior consent of the Attorney General or the District Court. Such a conclusion is tantamount to the proposition that the Voting Rights Act could be suspended until the Attorney General or the District Court approved of a State's instructions complying with the Act. Counsel for appellees submit that there is nothing in the Federal statute which even remotely evidences an intention on the part of the Congress to delay the effectiveness of the Voting Rights Act until such permission is first obtained.

No one can say how many illiterate voters were registered pursuant to the instructions of the State Board of Elections within the first sixty days of the enactment of the Voting Rights Act—persons who could not properly have been registered during this period if the position of the Solicitor General is sound. Similarly, there is no way to ascertain how many illiterate voters were assisted in casting their ballots at the general election in November of 1965, pursuant to the instructions in question—voters who could not have been thus assisted had it been necessary to await the expiration of a sixty-day period following issuance of the instruction on October 15, 1965.

Extending his contention, the Solicitor General suggested that this Court remand this case to the District Court with instructions "to grant such relief as is necessary to guarantee that Virginia will refrain from imposing restrictions upon the manner of casting write-in votes pending compliance" with the requirements of Section 5. This suggestion is obviously an attempt to convert the instant case into litigation of the character instituted by the United States in Alabama, Louisiana, Mississippi and South Carolina, as mentioned in the Solicitor General's memorandum. See, Memorandum for the United States, p. 6, fn. 3. Such a suggestion surely

undertakes to obscure the fact that no case warranting equitable relief has been made out in the instant litigation. As the District Court pointed out on two separate occasions in its opinion, no evidence was presented that Virginia's prohibition of stickers or pasters had been administered in a discriminatory manner and no evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he was entitled (App. 70a, 72a). Indeed, even the Solicitor General admits that Virginia's procedure for casting write-in votes by illiterates, on its face, has no purpose forbidden by the Voting Rights Act and that the Attorney General does not now have evidence that such a purpose existed. See, Memorandum for the United States, pp. 7-8. Thus, the suggestion that the case be remanded to the District Court is manifestly an effort to subject to the jurisdiction of a Federal court Virginia election officials against whom no suggestion of impropriety has been made. The instant case is not now—and never was—a suit to obtain relief from alleged discriminatory registration or voting practices of Virginia election officials, and counsel for appellees submit that neither the Solicitor General nor the appellants can now convert it into such a suit at the ultimate level of appellate review.

CONCLUSION

Virginia law does not permit stickers or pasters to be utilized by voters in casting or marking their ballots under any circumstances, regardless of the physical or educational condition of the individual voter. Notwithstanding, appellants appear to assert that they have the right to select the means which they will employ to vote for a "write-in" candidate (i.e., by use of pasters or stickers) regardless of whether or not Virginia law authorizes this method of voting. Ap-

parently, the right exists only in Virginia, for it is clear from the decisional authorities cited by the District Court that the propriety of utilizing stickers or pasters in this fashion is a matter for legislative determination by each State, and statutes of other States barring use of stickers or pasters are not subject to constitutional objection. Thus, as a constitutional proposition at least, appellants' assertion necessarily entails a determination that the Fourteenth Amendment guarantees educationally handicapped voters in Virginia a right which it does not equally secure to educationally handicapped voters in other States.

Implicit in appellants' position is the contention that the right to vote by means of stickers or pasters is a right granted by the Fourteenth Amendment and the Voting Rights Act of 1965 *to educationally handicaped voters only.* It is perfectly clear from the decisions canvassed in this brief, however, that the Fourteenth Amendment makes no such distinction between the educationally handicapped voter and the physically handicapped voter. Moreover, there is obviously nothing in the Voting Rights Act of 1965 or any of its implementing regulations which even remotely suggests that this method is even permissible, much less required, by the Federal statute.

Counsel for appellees submit that the provisions of Virginia law under attack in the instant case abridge no federally protected right of the appellants. Quite to the contrary, it is clear that in 1965 Virginia conformed its voting procedures to the requirements of the Voting Rights Act of 1965 in a manner substantially identical to that subsequently adopted by various Federal courts fashioning judicial relief under the statute. Surely, such procedures cannot be violative of either the Fourteenth Amendment or the Voting Rights Act of 1965.

In light of the foregoing, counsel for appellees submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for appellees in the above-captioned matter, hereby certify that copies of this Brief On Behalf Of Appellees have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 6th day of September, 1968, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Jack Greenberg, Esq., James M. Nabrit, III, Esq., Norman C. Amaker, Esq. and James N. Finney, Esq., 10 Columbus Circle, New York, New York 10019; and Oliver W. Hill, Esq., S. W. Tucker, Esq., Henry L. Marsh, III, Esq., Harold M. Marsh, Esq., 214 E. Clay Street, Richmond, Virginia 23219; and Anthony G. Amsterdam, Esq., 3400 Chestnut Street, Philadelphia, Pennsylvania, counsel for appellants. All parties required to be served have been served.

.....

First Assistant Attorney General

SUPREME COURT U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 25

J. C. FAIRLEY, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 25

J. C. FAIRLEY, ET AL.,
Appellants,

VS.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

VS.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

These consolidated cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 2870 of the Mississippi Code.

Section 170 of the Mississippi Constitution of 1890 provides:

> "Each county shall be divided into five districts, a resident freeholder of each district shall be selected, *in the manner prescribed by law*, and the five so chosen shall constitute the Board of Supervisors of the county, a majority of whom may transact business." (Emphasis added)

Prior to May 27, 1966, each of the Members of the Boards of Supervisors in each of the Counties of Mississippi, including the Appellees, Adams and Forrest Counties, were elected by the qualified electors from their respective districts pursuant to Section 2870 of the Mississippi Code and Section 170 of the Constitution of Mississippi of 1890.

Pursuant to the authority granted the Legislature of Mississippi by Section 170 of the Mississippi Constitution of 1890, effective May 27, 1966, the Legislature of Mississippi amended Section 2870 to provide that Members of the County Board of Supervisors could, at each county's option, be elected at large on a county-wide basis by all qualified electors of the County, and, in good faith, the legislative amendment mandatorily required that if 20% of the qualified electors of the County shall present to the Board of Supervisors a petition objecting to such alternative method within sixty days after the adoption and final publication of any such alternative method, then the Board of Supervisors must call an election, after due notice provided, and the question on the ballot shall be whether the members of the Board of Supervisors shall be elected at large or by districts. The actions of the Appellees, Adams and Forrest Counties, in adopting the "at large" method of election of their Supervisors completely complies with the "one-man, one-vote" mandate of this Court. Moreover, the

legislative purpose in adopting the amendment of 1966 was to allow the several counties a method of complying with the mandate of this Court of "one-man, one-vote."

Appellants in their original Complaint asserted a second claim for relief claiming that the Amendment to Section 2870 of the Mississippi Code, and the action taken pursuant thereto by the Appellees, had the purpose and effect of denying or abridging on account of race or color the right to vote of the individual Appellants and the class they purported to represent and further charged said actions prevented the election of Negro candidates to the County Boards of Supervisors and that the said actions deterred potential Negro candidates from running for the Office of County Supervisor in said Counties. This second claim was *dismissed upon the voluntary Petition For Dismissal of the Appellants.*

SUMMARY OF ARGUMENT

This Court has before it the following propositions for decision on this appeal:

1. Whether a three-judge court was properly convened for the trial below and therefore whether an appeal lies directly to this Court.

2. Whether the controversy contained in the Complaint is moot in view of the fact that the Attorney General of the United States has made no objection to the enactment and enforcement of Section 2870 of the Mississippi Code of 1942, as amended, within sixty days of being informed thereof.

3. Whether Section 5 of the Voting Rights Act of 1965 entitles private parties to initiate proceedings for enforcement of said Section.

4. Whether Mississippi Code, Annotated, Section 2870, as amended, and the actions of Forrest and Adams Counties thereunder fall within the purview of Section 5 of the Voting Rights Act of 1965.

5. Whether, assuming that the Appellees are wrong in all other contentions made by them in this Brief, this Court should in equity and good conscience, set aside the elections of November, 1967.

As to Proposition No. 1, Appellees contend that this Court does not have jurisdiction of these actions because the three-judge district court was improperly convened. In order to properly convene a three-judge district court there must be specific statutory authority therefor. That authority is wholly lacking in the actions filed below. Nowhere in Section 5 of the Voting Rights Act does there appear any authority, stated or by necessary implication, for the convening of a three-judge district court other than in an action for declaratory judgment at the suit of a state or its political subdivision and then only in the United States District Court for the District of Columbia.

As to Proposition No. 2, Appellees contend that Section 5 of the Voting Rights Act allows the implementation of a statute when the Attorney General of the United States makes no objection thereto within sixty days after being informed thereof. Appellees contend that the Attorney General has been informed of the enactment and implementation of Section 2870 of the Mississippi Code of 1942, as amended, for more than sixty days and has made no objection thereto.

As to Proposition No. 3, Appellees urge that Section 5 of the Voting Rights Act neither could nor attempted to vest in private individuals the authority to institute proceedings to enforce the Section. It is clear from a reading

of the Voting Rights Act that such authority is bestowed solely upon the Office of the United States Attorney General. To read the Section as Appellants contend is to authorize a suit by a private individual against a sovereign state of the Union. Such a suit would contravene the most basic principles of established law.

As to Proposition No. 4, Appellees contend that Section 2870 of the Mississippi Code of 1942, as amended, by the 1966 Session of the Mississippi Legislature and the actions taken thereunder by the Counties of Forrest and Adams do not come within the purview of Section 5 of the Voting Rights Act of 1965 since said Section 5 deals entirely with changes in the registration and/or voting processes of a state or political subdivision thereof. The changes brought about by said Section 2870 and the actions taken thereunder by the said Counties in nowise affect the registration and/or voting procedures of the State of Mississippi or the said Counties which were in effect prior to November 1, 1964. Said Section and actions thereunder deal entirely with redistricting which subject matter is not governed or controlled by the said Voting Rights Act, as reflected by the language of said Act, the Congressional debates, the Congressional hearings, Court decisions involving the said Act, the case of *South Carolina* v. *Katzenbach*, 383 U.S. 301, and the contention of the Attorney General in *Apache County* v. *United States*, 256 F. Supp. 903.

5. As to Proposition No. 5, Appellees contend that even in the event this Court should find that Appellees are wrong in all of the above contentions that this Court should not void the elections held in November, 1967, for the Office of Supervisor in the Counties of Adams and Forrest in view of this Court's teachings in *Sims* v. *Reynolds*, 377 U.S. 533, *Roman* v. *Sincock*, 377 U.S. 695 and *Davis* v. *Mann*, 377 U.S. 678. To do otherwise would disrupt the orderly conduct of county government in the two Counties affected.

ARGUMENT

I.

Jurisdiction—Whether Three-Judge District Court Was Properly Convened

The threshold question before the Court, the consideration of which was postponed to the merits, is whether this Court, rather than the Court of Appeals, has jurisdiction to review the district court's determination, and this in turn depends on whether a three-judge court was required. Appellants assert that it was not.

The authority, if it exists, for convening the three-judge district court in these actions must be conferred by Section 5 of the Voting Rights Act of 1965. (42 U.S.C. 1973c) The question of the convening of three-judge district courts in these actions outside the authority conferred, if such authority is conferred, by Section 5 of the Voting Rights Act is foreclosed by this Court's decision in *Swift & Co.* v. *Wickham*, 382 U.S. 111.

All counsel at bar appear to be in accord that the jurisdiction of the Three-Judge District Court and thereby the jurisdiction of this Court rest upon the construction to be given the last sentence of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) here quoted for ready reference by the Court:

> "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

Section 5 of the Act provides for only one kind of action—an action by a state or its political subdivisions with respect to which the prohibition set forth in Section

4(a) is in effect for a declaratory judgment that any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, which said state or political subdivision enacts or seeks to administer does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Section 5 further provides, and all counsel at bar agree, that the court before which said action shall be heard is the United States District Court for the District of Columbia, and that said Court shall be a three-judge court and any appeal shall lie to this Court.

The quoted language of Section 5 is plain and unambiguous. The phrase, "any action under this Section" can only mean any action the institution of which is authorized by and instituted pursuant to the provisions of said Section. Far from Appellant's contention that the phrase "any action" suggests more than a declaratory judgment action, the phrase in its ordinary and accepted meaning unequivocally limits the mandate for a three-judge court to actions "under" or pursuant to this Section.

Appellants, at page 8 of their last filed Brief, adopt the rationale of MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE, pages 8 and 9. There the Solicitor General urges that since the above quoted language of Section 5 is separated from the opening sentence of the Section, its location has some significance. Appellees submit that not only does the sentence appear in the most logical place, but that its location lends support to the argument that it was the intention of Congress that the language apply to no actions other than actions for declaratory judgments. Moreover, it is clear that the phrase "any action" as contained in Section 5 applies only to the actions authorized by the Section since the sentence

is not even a separate paragraph within the Section but is a part of the one paragraph which makes up the entire body of Section 5. In fact, the quoted sentence is in no manner separated from the body of the Section.

If Congress had intended, as Appellants urge, that jurisdiction be conferred on the three-judge court in the instant case, the statute, too easily, could have been drafted to so provide. Appellants argue that the last sentence of Section 5 must be read to permit a suit by aggrieved individuals alleging a violation of Section 5 to be filed in the district court of the district in which violation by a state or its subdivision is alleged to have occurred and that thereupon the district judge must convene a court of three judges to hear the suit. Nowhere in Section 5 can be found a mention of any court other than the United States District Court for the District of Columbia. Section 5 is a specific enlargement of the general jurisdiction of the Federal Courts. In enacting Section 5, Congress did so in light of the provision of Section 2281. (28 U.S.C.) To adopt the construction of the last sentence of Section 5 urged by Appellants is to engraft by strained inference upon the jurisdiction of United States district courts other than that of the District of Columbia a special and an enlarged jurisdiction without express provision therefor in the statute.

The Section, as written, contains no enforcement provision. As a matter of fact, the only provision for enforcement of Section 5 that appears in the Act is Section 12(d) and that provision authorizes only the United States Attorney General to institute "an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under

this Act to vote and (2) to count such votes." Paragraph (f) of the same Section provides that the district courts of the United States shall have jurisdiction of such proceedings. It does not provide for a three-judge court as does Section 10(c) for action brought under Section 10. It must be concluded that the only enforcement of Section 5 contemplated by the Act is pursuant to Section 12(d) and further, in the absence of a specific recitation by Congress providing for a three-judge court, that all enforcement proceedings shall be vested in the United States District courts, one judge sitting.

Appellants allude to the language in Section 5 of the Act, "subsequent action to enjoin enforcement of such qualification." This language is taken out of context and thereby loses its meaning completely. Said language was inserted in Section 5 of the Act to make plain that the Attorney General could bring a subsequent action to enjoin the enforcement of such qualification, prerequisite, standard, practice or procedure, if said enforcement was in violation of the Constitution of the United States. Appellants assert that "such an action would be under the Fifteenth Amendment, and would, therefore require a three-judge court under 28 U.S.C. 2281 in any event," therefore making the last sentence of the paragraph superfluous. This contention is without merit since the said subsequent action by the Attorney General contemplated by the above quoted language would be based not upon the ground that the qualification, prerequisite, standard, practice or procedure is unconstitutional, but that they are enforced in an unconstitutional manner. It is elemental that 28 U.S.C. 2281 does not control an action wherein the ground for said action is unconstitutional enforcement rather than unconstitutionality of the law itself. *Phillips* v. *United States*, 312 U.S. 246.

The Court's attention is invited to Section 14(b) of the Act. We find therein the language that:

> "[N]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any *declaratory judgment* pursuant to . . . Section 5 . . ." (Emphasis added)

Since the actions now on review before this Court are actions requesting declaratory judgments if such are "under" or "pursuant to" Section 5 of the Act, then jurisdiction to hear said actions would rest exclusively in the District Court for the District of Columbia. Said Section 14(b), if it means what it says, would appear to be the death knell to Appellants' argument that the present actions were brought "under" or "pursuant to" Section 5 of the Act.

Appellants assert in their Brief at Page 9 that:

> "[T]he purpose of the Voting Rights Act of 1965 and of three-judge courts in general support Appellants' contention that all actions related to Section 5 must be heard by a three-judge court."

This statement vividly points up Appellants' apparent misconception of the thrust of the said Act and the legal and constitutional theories upon which the Act was predicated. The proviso in Section 5 of the Act which requires a state or political subdivision to first obtain the approval of the Attorney General or in the absence of such approval, the approval of the United States District Court for the District of Columbia before enacting or administering voting laws different from those in effect prior to November 1, 1964, is based upon the "freezing" principle. A suit by the Attorney General, as contemplated by Section 5 of the Act, to enjoin the operation and enforcement of new voting laws until such laws are first submitted to the Attorney General or the United States District Court for the District

of Columbia does not draw into question the constitutionality of such voting laws, and therefore does not come within the ambit of the concern expressed by Congress in the enactment of 28 U.S.C. 2281. The actions now before this Court are not actions seeking an injunction against the enforcement of Section 2870, Mississippi Code, Annotated, 1942, as amended, and/or the actions taken thereunder by Adams and Forrest Counties on the ground that said Section or said actions are unconstitutional. This Court is not here confronted with a combat or clash between the sovereign state and/or political subdivision thereof and individuals in the constitutional arena. It is worthy to note that in actions brought by the United States under 42 U.S.C. 1971 in which the Attorney General requests a finding of a pattern or practice of discrimination, the Attorney General or any Defendant in such actions may request that a court of three judges be convened to hear and determine the entire cases. This proviso was inserted in said Section 1971 because the United States District Courts hearing and determining such cases could suspend, if they deemed necessary, certain voting laws of a state or political subdivision or portions thereof. But before the Courts could suspend such laws they must first find that such laws were being unconstitutionally administered. In the actions now before the Court no such finding is necessary, therefore such actions do not even rise to the same dignity as those under 42 U.S.C. 1971. Even under said Section 1971 the convening of a three-judge district court was not mandatory.

It was necessary to place in Section 5 of the Act the proviso in regard to the convening of a court of three judges because the court action contemplated by said Section is one whereby, as a practical matter, an adverse finding as to the Plaintiff by the United States District Court for the District of Columbia would be tantamount to the issuance

of an injunction enjoining the enforcement and operation of certain state laws because they have the purpose and will have the effect of denying or abridging the right to vote on account of race or color. Though this would be the practical effect of such a holding by the said District Court it would not technically come within the provisions of 28 U.S.C. 2281 because no judicial injunction is sought or issued since the injunction against the enforcement of such laws is the legislative injunction contained in the Act. Therefore, Congress deemed it appropriate to assert in said Section 5 of the Act, the last sentence which is now before this Court for construction. The congressional concern for this technical point is evidenced by the colloquy between Senator Ervin and Attorney General Katzenbach found at Pages 48-49 of the Hearings Before the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, First Session, which though directed to Section 4(a) of the Act is equally applicable to Section 5. A portion of said colloquy is here quoted for the benefit of the Court:

> "SENATOR ERVIN. But that is what the district court is here for, to determine whether denial or abridgment has occurred. At least, theoretically, they are here to give a person a chance to prove that he has not done that.
>
> ATTORNEY GENERAL KATZENBACH. Senator, my reason for interpreting it this way would be that you do not get that kind of a judgment under this procedure in a previous paragraph. The only thing you can get under it is a declaratory judgment that you have not. You do not get a judgment that you have. Therefore, I would not have thought that this would have applied. But if the point is not clear, we ought to make it clear, I agree with you.
>
> They seek a declaratory judgment that they have not; there is evidence that they have. The court denies the declaratory judgment that they have not. There is no judgment made that they have."

Further, at Page 71 of said Hearings, we find the following colloquy between Senator Ervin and Attorney General Katzenbach:

> "SENATOR ERVIN. Is it the purpose of this bill to deny the district judge the right to try one of these cases by him or based upon—
>
> ATTORNEY GENERAL KATZENBACH. No. I think the three-judge court is surely appropriate. You are testing here a constitutional question—
>
> SENATOR ERVIN. And I—
>
> ATTORNEY GENERAL KATZENBACH (continuing). On denial or abridgment. It goes into the 15th amendment question and I think the use of the three-judge court is quite appropriate. I didn't mean to cast any aspersions by drafting it this way."

On several occasions courts in the Fifth Circuit have determined the question as to what actions taken by a state or political subdivision thereof come within the purview of the Voting Rights Act of 1965 without convening a court of three judges. In *Davis* v. *Gallinghouse,* 246 F. Supp. 208, a one-judge district court determined that documentation of residence did not come within the Voting Rights Act ban on tests and devices. In *United States* v. *Ward,* C.A. La., 1965, 352 F.2d 359 and *United States* v. *Ramsey,* C.A. Miss., 1965, 353 F.2d 650, the Court of Appeals for the Fifth Circuit remanded cases to one-judge district courts to enjoin the enforcement and operation of certain state statutes on the ground that they came within the proscription of the Voting Rights Act of 1965.

None of the reasons which brought about the enactment by Congress of 28 U.S.C. 2281 underlay an action wherein the conflict is between a state statute and a federal statute rather than a state statute and the Constitu-

tion of the United States. In the actions now before this Court the conflict is between a state statute and actions thereunder and a federal statute and do not involve a conflict between a state statute and actions thereunder and the Constitution of the United States.

II.

This Action Is Moot Since the Attorney General Has Failed to Interpose Any Objection to Section 2870 of the Mississippi Code As Amended or the Actions Taken Thereunder Within Sixty Days After Said Changes Were Brought to His Attention

Section 5 of the Voting Rights Act of 1965 provides:

> "[T]hat such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, or procedure has been submitted by the Chief Legal Officer or other appropriate official of such state, or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . ."

It will be noted that while neither the State of Mississippi, Forrest County nor Adams County has submitted to the Attorney General of the United States Section 2870, Mississippi Code, as Amended in the 1966 Legislative Regular Session, and/or the actions taken under said Section by Adams and Forrest Counties, such submission has been made by the Order of this Court of March 11, 1968, inviting the position of the United States as to this matter. To this date, being more than sixty days from said submission, the Attorney General has not interposed any objection to said Section and/or said actions thereunder. Even though the United States accepted the invitation to file a Memorandum, which Memorandum was filed more than sixty days after this Court's Order of March 11, 1968,

it still did not interpose an objection. In that particular, the situation in these cases is in nowise different from the situation which existed wherein the altered Voting Laws of South Carolina were approved by the Attorney General although never submitted by the State of South Carolina for jurisdictional review in the District Court for the District of Columbia nor to the Attorney General for his scrutiny. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 320.

The United States in its Memorandum at Page 15 states that:

> "[S]ince Section 5's approval procedure was designed to serve an informing function—to provide a method of bringing to the attention of the Government changes in state law' (Assistant Attorney General Marshall's House Hearings, Page 72), . . ."

The import of this interpretation of Section 5's approval procedure, placed upon it by the United States, is that when the Attorney General is "informed" of a change in state voting laws that the method by which he is "informed" is of no consequence and the sixty day period in which he may object to the change as provided for in said Section commences to run upon his being so "informed." We suggest to the Court that the Attorney General received the information regarding said Section 2870 of the Mississippi Code and the actions taken under said Section by Adams and Forrest Counties in the same and like manner, i.e., a proceeding in this Court, as he received the information regarding the change or changes in the Voting Laws of South Carolina which he affirmatively approved in *South Carolina* v. *Katzenbach*, supra. We suggest that his failure to object in these cases is tantamount to his affirmative action in *South Carolina* v. *Katzenbach*. Therefore, Appellees and this Court must

"assume[d] from past silence [is] that the Attorney General was not prepared to interpose an objection to the changes being effected, and thus declined to seek to compel a State or political subdivision to comply with what would have in all likelihood been a wholly formalistic step that would merely have delayed final implementation of a constitutionally required restructing of government." (Memorandum for United States, Page 22)

We reiterate that the Attorney General has not to this date interposed an objection even though he was afforded an opportunity by this Court to so do.

Nowhere in the Memorandum of the United States is an objection registered to Section 2870, Mississippi Code and/or the actions taken thereunder. In fact, the United States affirmatively asserts that:

> "[O]ur (The United States') submission (of this memorandum), of course, does not reach the ultimate issue of the validity of the challenged State laws; . . ." (Memorandum for the United States, Page 11).

We hasten to acknowledge that the United States continues by asserting that the question of validity would have to be "resolved by the District Court for the District of Columbia if the Attorney General, upon investigation, *shall determine to interpose objection.*" (Memorandum for the United States, Page 11) (Emphasis added) But we suggest that any objections, if such should materialize, must be interposed as the basis for an independent suit by the United States to enjoin the operation and enforcement of Section 2870 of the Mississippi Code and/or actions taken under and by virtue of said section (see *United States* v. *Mississippi*, 380 U.S. 128) since the sixty day period which in the Attorney General (United States) could have interposed an objection under and by virtue

of Section 5 of the Act has elapsed. We submit that the apparent attempt by the Attorney General (United States) to extend its right (conferred by Section 5) to interpose objections beyond the sixty day period provided for in the said section must fail when viewed in light of the obvious purpose and reason for inserting this period of limitation upon the exercise of said right. Obviously, Congress was of the mind that this "uncommon exercise of congressional power"; except under exceptional circumstances "not appropriate" legislation; which reposes in the Attorney General of the United States veto power over certain legislative acts of sovereign states must be exercised, if exercised at all, with diligence and dispatch. Congress by inserting the sixty day period of limitation admonished the Attorney General that not only could he not sleep on this "uncommon" right but that that he could not even "doze" thereon. This obvious purpose and reason for the limitation comports with congressional concern for the exercise by Congress of its authority in this permissible but "decisive" manner.

This suggestion of moothess is advanced only on the assumption, arguendo, that Section 2870, Mississippi Code, and the actions taken thereunder by Adams and Forrest Counties come within the purview of the Voting Rights Act of 1965, which assumption is emphatically denied.

III.

Private Parties Lack Standing to Initiate Proceedings to Enforce Section 5 of the Voting Rights Act of 1965

The United States in Footnote 7 of its Memorandum raises and at the same time attempts to resolve the question whether these Appellants had the right to institute these actions to enforce the proscription contained in Sec-

tion 5 of the Act. We agree with the United States that the question is present, but disagree that it is resolved in favor of the right of Appellants to bring these actions but submit that it is resolved against such right. This is a jurisdictional question which was raised and urged by Appellees in the trial court by their Motions to Dismiss for Lack of Jurisdiction but because of the disposition by that Court in *Bunton, et al.* v. *Joe T. Patterson, et al.*, No. 26, which disposition was made immediately prior to the argument in *Fairley* v. *Patterson*, No. 25 (these cases), said question was not pressed. Further, said jurisdictional question, though not argued in Appellees' Motion to Dismiss or Affirm filed in this Court, was presented by Appellees moving this Court to dismiss the appeal. If Appellees had based their Motion solely on the ground that no substantial question on the merits had been raised or presented the Motion would have been only a motion for summary affirmance but since Appellees were aware of the jurisdictional questions involved in these cases, they moved the Court for a *dismissal* or in the *alternative* a *summary affirmance of the Judgments.*

We suggest to the Court that the question of whether these Appellants have a right to bring these actions as private citizens is a more serious jurisdictional question than the jurisdictional question posed by the convening of the three-judge courts. As readily admitted by the United States, since it could do no less, the "Voting Rights Act itself does not expressly provide for private suits to enforce Section 5 . . ." (Memorandum for The United States, Footnote 7.) The United States then attempts to resolve this question of jurisdiction by merely stating that it "would *seem* to be conferred on the District Courts by 28 U.S.C. 1343 (4)." (Emphasis added) (Footnote 7) This indecisive statement, lacking all legal support, does not square

with the position previously taken by the United States in its Memorandum that these actions were brought under and by virtue of Section 5 of the Act. It appears that the United States is attempting to have its cake and eat it too. We submit that the United States has decided in advance where it wants to go and in its Memorandum is making a futile attempt to get there.

As we read the Voting Rights Act of 1965, and particularly Section 5, thereof, it confers no rights upon any private citizens, but is merely a remedial statute by which the right to vote guaranteed by the Fifteenth Amendment to the Constitution of the United States will be vindicated.

The United States contends that Section 5 of the Act "explicitly confers upon individual citizens a *right* . . ." (Emphasis added) (Memorandum for the United States, Footnote 7) This contention finds no support in *South Carolina* v. *Katzenbach*, 383 U.S. 301, but is, in fact, refuted by the Opinion therein. This Court said at page 308 that: "[T]he Act creates stringent new remedies . . ." and addressing itself specifically to Section 5 remarked that "Section 5 prescribes a second *remedy* . . ." (Emphasis added) (383 U.S. at page 316)

Further, while focusing on Section 5 of the Act, the section which the United States points to as conferring a *right*, this Court opined that "[A]n appropriate *remedy* is a judicial determination that continued suspension of the new rule is unnecessary to *vindicate rights guaranteed by the Fifteenth Amendment.*" (Emphasis added) (383 U.S. 335)

Dispositive of the question whether this Act creates certain new voting *rights* or only secures and protects existing voting rights guaranteed by the Fifteenth Amendment to the Constitution of the United States is the language of this Court that:

"South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the Courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.' By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for *implementing the rights created in § 1.* 'It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.' Ex parte Virginia, 100 U.S. 339, 345, 25 L. Ed. 676, 679. Accordingly, in addition to the courts, Congress has full *remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.*" (Emphasis added except "enforce") *South Carolina* v. *Katzenbach,* 383 U.S. 301, 325, 326.

A reading of the Act reveals that the enforcement, thereof, is exclusively in the Attorney General of the United States. This is confirmed by this Court's comment that:

"[A]fter enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, *with authority in the Attorney General to employ them effectively.*" (Emphasis added) *South Carolina* v. *Katzenbach,* 383 U.S. 301, 337.

It is inconceivable that the Congress of the United States intended to place in the hands of any and all private citizens authority to enforce Section 5 of the Voting Rights Act. As announced by this Court in discussing said Section 5 of the Act in *South Carolina* v. *Katzenbach,* supra, 334:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellees fail to comprehend how it could be seriously contended that the enforcement of such an "uncommon exercise of congressional power" and "extraordinary power to veto" in the Attorney General would be exposed to the whim of any disgruntled private citizen.

Further, this Court continuing to allude to Section 5 of the Act, stated at page 335 that:

> "[A] state or political subdivision wishing to make use of a recent amendment to its voting laws therefore, has a concrete and immediate 'controversy' *with the federal government.*" (Emphasis added)

This Court did not hold, at any place in its Opinion that authority was in private citizens to "employ" the "array of potent weapons" contained in the Act or that the enforcement of any voting laws created a "controversy" between a State or political subdivision thereof and a private citizen or citizens.

Assuming, arguendo, that the statute and actions taken by the Appellee counties thereunder, presently before this Court, come within the purview of the Voting Rights Act of 1965, these actions could have been mooted at any time by the State of Mississippi, or Adams County, or Forrest County, submitting said statute and actions thereunder to the Attorney General of the United States and he approving same. The Appellants in these actions would have had no standing in any Court to object to the action of either the Appellees, the State of Mississippi, or the Attorney General. It is difficult to conceive of a right of action which can so readily be extinguished without the approval of the party or parties in which the right allegedly exists.

It is apparent throughout the Act and as stated by the United States in its Memorandum that the only purpose for this proviso in Section 5 of the Act is to inform the Attorney General of any new voting laws to be enforced in a State covered by the Act. It was never intended as a proviso to inform private citizens of such actions taken by a State and never intended to vest any right or authority in any private citizen. The only remedy conferred upon a private citizen by the Act is found in Section 5 thereof which, as the United States points out in its Memorandum at page 8, is to not be "denied the right to vote for failure to *comply* with such" new voting laws. (Emphasis added) This position comports with the position Appellees took in their Motion to Dismiss or Affirm filed in this Court.

We suggest to the Court that Congress intended, as this Court has stated, to "marshal an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." We submit that Congress, realizing that the enactment of Section 5 of the Act was an "uncommon exercise of congressional power", was insistent that any confrontation with a sovereign state or political subdivision thereof be with the United States only. For the good order of the Republic, Congress could have done no less. It is almost ludicrous to even suggest that the Congress of the United States would demean a great and sovereign state to a position whereby a private citizen could veto a statute enacted by such state and enjoin the operation of same without the necessity of first alleging and proving that the statute is unconstitutional.

This Court, in discussing said Section 5 in *South Carolina* v. *Katzenbach,* 383 U.S. 301, 335, declared that "[T]he Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension . . ." We suggest that this is a clear indication by this Court that such enforcing

mechanisms are confined within the four corners of the Act. A search within these confines fails to disclose any authority, express or implied, for a private citizen to institute an action to enforce the proscription contained in Section 5 of the Act.

Appellees are at a loss to understand the position taken by the United States of asserting that individual citizens have standing to institute a proceeding to enforce a substantive requirement of the Voting Rights Act of 1965. This loss is caused by the fact that in its "Memorandum in Support of Plaintiffs' Motion to Convene a Three-Judge Court and in Opposition to the Motion of Third Parties to Intervene as Defendants" filed June 17, 1966, in *Apache County* v. *United States,* Civil Action No. 292-66 in the United States District Court for the District of Columbia, at Page 9 thereof the United States asserted that:

> "[T]he Attorney General has *exclusive* responsibility to enforce the substantive requirements of the Voting Rights Act, and most of the enforcement is accomplished administratively. See Sections 4(b), 5, 6, 7, 8 and 9." (Emphasis added)

If the Attorney General ever had *exclusive* responsibility to enforce the substantive requirements of the Voting Rights Act and in particularly Section 5 thereof, then the said Attorney General should still have *exclusive* responsibility since Appellees are without knowledge of any amendment to the Voting Rights Act of 1965 which would divest the Attorney General of such *exclusive* responsibility.

As stated in *Apache County* v. *United States,* 256 F. Supp. 903, Page 906:

> "[B]ut the right enforced by this remedy [Voting Rights Act of 1965] is a *public right* appertaining not to individual citizens, but to the United States itself—

> called upon by Congress in implementing the Fifteenth Amendment, to vindicate the right of all citizens of the United States collectively to be free from discrimination in any part of the United States on account of race or color. This *public right* and remedy are supplementary to but analytically distinct from the individual rights of those discriminated against by or in the areas involved." (Emphasis added)

Although the quoted language was directed toward Section 4(a) of the Act the rationale of said language is equally applicable to Section 5 of said Act.

The United States asserts that the special authorization conferring standing on the Attorney General to institute proceeding to enforce the provisions of the Voting Rights Act of 1965 was inserted in the said Act since the Attorney General "might otherwise not be deemed empowered to vindicate private rights. See *United States* v. *Raines*, 362 U.S. 17, 27." (Memorandum for United States As Amicus Curiae, Page 9, Footnote 7)

The United States, under the Voting Rights Act of 1965, is not vindicating private rights, but as stated in *Apache County*, is vindicating a *public right*. Further, this is the rationale of *United States* v. *Raines*, 362 U.S. 17, when this Court stated at Page 27 that:

> "[B]ut there is the highest *public interest* in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights and we think it perfectly competent for Congress to authorize the United States to be the guardian of that *public interest* in a suit for injunctive relief." (Emphasis added)

What the United States District Court for the District of Columbia and this Court were saying is that the United States, when it institutes a proceeding either under 28 U.S.C. 1971 or the Voting Rights Act of 1965 is vindicating

a *public right* and *public interest* and only indirectly a private right or private interest. As noted in *Apache County* v. *United States*, supra:

> "[C]ongress has specifically provided that a person who under color of state law deprives a United States citizen of any right secured by the Constitution and Laws 'shall be liable to the party injured in an action at law, suit at equity, or other proper proceeding for redress.' R. S. Section 1979, 42 U.S.C. 1983."

The Appellants cite Section 12(f) of the Voting Rights Act of 1965 and attempt to gain mileage therefrom on the theory that since Congress used the word "person" rather than "the Attorney General" it must have contemplated suits by private parties under the Act. We invite the Court's attention to Section 12(e) of the Act which authorizes the Attorney General to file with the District Court "an application for an order providing for the marking, casting, and counting of the ballots of such persons [those eligible to vote who were denied the right to vote] and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto." In this particular type of action the district court would lack jurisdiction unless the person denied the right to vote exhausts his administrative or other remedies in absence of the provision of Section 12(f).

Further, we suggest to the Court that it is significant that in said Section 12(f) Congress saw fit to use the phrase "a person asserting rights" rather than the phrase "parties aggrieved" which appears in Section 1971d, 42 U.S.C. The phrase "person asserting" includes any individual who notifies the Attorney General of the United States that his voting rights secured by the Voting Rights Act of 1965 have been infringed whereas the phrase "party aggrieved" includes only individuals who have actually instituted proceedings to enforce their voting

rights. We suggest to the Court that the use of the word "person" in one Section and "party" in another Section was not a mere substitution of words with equal import but has significant legal ramification.

The cases cited by the Appellants on Page 11 of their Brief do not support Appellants' position because from the legislative history of the Voting Rights Act, from the language of the Act itself and from the assertion of the United States in the aforementioned Brief filed in *Apache County* v. *United States,* supra, "exclusive responsibility to enforce the substantive requirements of the Voting Rights Act" is reposed in the Attorney General of the United States. All cases cited by the Appellants would have been decided differently had the statutes indicated that private persons though injured by violations of such statutes were not authorized to institute proceedings thereunder. *Goodman* v. *H. Hentz & Co.,* 265 F. Supp. 440, 447. Further, as stated in *Apache County,* and as admitted by Appellees, Appellants are nowise precluded from filing an action in the United States District Court for the Southern District Court of Mississippi and alleging therein invidious discrimination.

IV.

Section 2870 of the Mississippi Code of 1942, As Amended, by the 1966 Session of the Mississippi Legislature and the Actions Taken Thereunder by the Counties of Forrest and Adams Do Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c)

These actions were purportedly brought by two classes of individuals. One class represents individuals who seek or desire to seek the Office of Supervisor and the other class represents the individual voters who cast their votes in the elections for Boards of Supervisors. As to the class

representing the candidates, we submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit that the colloquy between Representative Corman and the Honorable Burke Marshall found at Page 74 of the Hearings before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty-Ninth Congress, First Session on H.R. 6400, Serial No. 2 and here set out for the convenience of the Court forecloses further argument in this regard.

> "MR. CORMAN: We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964. Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?
>
> MR. MARSHALL: The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."

As to the remaining class purported to be represented in these actions, we submit to the Court that Section 2870, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). The Voting Rights Act of 1965 is entitled: "An Act to Enforce the Fifteenth Amendment to the Constitution of the United States and for Other Purposes." The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General of the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

> "This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.
>
> This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.
>
> It will provide for citizens to be registered by officials of the U.S. Government if the State officials refuse to register them.
>
> It will eliminate tedious, unnecessary lawsuits which delay the right to vote.
>
> Finally, this legislation will insure that properly registered individuals are *not prohibited from voting.*" (Emphasis added)

These consolidated cases involve a question that turns upon construction of a Federal Statute. Most relevant to the construction of a Federal Statute is the very language which Congress has expressed its policy and from which the Court must extract the meaning most appropriate. *Local 1976, U.B.C. & J.* v. *N.L.R.B.*, 357 U.S. 93.

Section 5 uses the words "qualification", "prerequisite", "standard", "practice", or "procedure", five different times. They do, in each instance where they are used, refer only to "voting" which is defined in the Act by Section 14(c)(1) thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be cast, counted, ". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words, "qualification", "prerequisite", "standard", "practice", or "procedure" are to be applied exclusively to "vote" or "voting", as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis,' that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303.

We submit to the Court that the above quoted words from the company they keep are limited as they apply to "vote" or "voting" and do not apply to the candidates who are voted upon.

The Amendment to Section 2870 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing with vote or voting, but deals exclusively and solely with the method by which the Supervisors of a County will be elected. Determination of the method by which the vote is to be taken is a matter within the inherent and exclusive jurisdiction of the States and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is invited to one of these mechanisms which is contained in Section 5 of the Act (42 U.S.C. 1973c). This Section contains the proviso that in the event a State or political subdivision shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or in effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively, or by his failure to object of by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as "to yield, accommodate, or to adapt one's self to, to act in accordance with." We suggest to the Court that the use of the word "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice, or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 2870 of the Mississippi Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964, except to permit a person to cast a vote for four additional candidates for the Board of Supervisors of the County in which the person resides.

This mechanism in the Act whereby a person has the right to vote without *complying* with a voting qualification or prerequisite to voting, or standard, practice, or procedure, with respect to voting different from that in force or effect on November 1, 1964, in truth and in fact, contemplates a new obstacle placed in the path of an individual in the voting procedure and allows that individual to cast

his vote, have it counted and included in the appropriate totals of votes cast with respect to candidates and propositions without *complying* with said new procedure. Section 2870, Mississippi Code, as amended, does not concern itself with any act which a person could refuse to *comply* with before voting and the procedure incident thereto.

An application of the plain and unambiguous language of the Act to the amendment now in question makes it clear that this amendment is not covered by or within the purview of the restriction on new voting regulations imposed by Congress. The Statute, being clear and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon*, 366 U.S. 643, and *United States* v. *McKesson & Robbins, Inc.*, 251 U.S. 305.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 2870, as amended, of the Mississippi Code.

On Page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of "a provision of this kind, you leave it open to a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting*, and we had to litigate the *new qualifications for voting*." (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C. 1973c appears the following:

SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"

ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.

It occurred to us that there are other ways in which states can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.

This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered.

ATTORNEY GENERAL KATZENBACH: "Yes, Sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices—'

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests' and devices.' And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right*; and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added).

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

"FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the

courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which has been precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a common-sense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices, or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect

was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator.'

The Bill was amended so as to substitute the words "standards, practices or procedures" in lieu of the simple word "procedure". This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the

right to register to vote; and did not pertain to the method of electing candidates for office.

We further invite the Court's attention to the remarks of Attorney General Katzenbach when he appeared before the House Committee on the Judiciary to explain the provisions of the Voting Rights Act of 1965. The Attorney General stated at Page 11 of Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-Ninth Congress, First Session on H. R. 6400 that:

> "[T]he bill also contains a provision dealing with the problem of attempts by states within its scope to change present *voting qualifications*." (Emphasis added)

This comment was addressed to what now is Section 5 of the Voting Rights Act of 1965

At a later point during the testimony of the said Attorney General, we find the following colloquy directed toward the said Section 5 of the said Act

> "THE CHAIRMAN. In other words, your language on page 7, line 25 is all-sweeping and covers the enactment of any law on voter *qualifications*.
>
> MR. KATZENBACH. That is correct, Mr. Chairman." (House Hearings, Page 60) (Emphasis added)

Later, during an exchange with Senator Ervin, the Attorney General in discussing what is now Section 5 of the Act stated that it was "quite a strong power" but that the effort was to "prevent this constant *slowing down process* which occurs when states enact new laws that may be clearly in violation of the Fifteenth Amendment. . . ." (Emphasis added) (Page 237) It is quite obvious from this comment by Attorney General that he was discussing laws dealing with registration and/or voting procedure.

In no way could the action of a state or political subdivision thereof in reapportioning or redistricting be regarded as a slowing down process.

The sum total of the remarks directed to 42 U.S.C. 1973c in the Congressional Committee Hearings and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C., Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress in 42 U.S.C. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 2870, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C. 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under Section 1973b(a) of 42 U.S.C. This clearly shows the intent of Congress to include in the terms "qualifications", "prerequisites", "standards", "practices", or "procedures" only those acts of a State or a political subdivision thereof which would discriminate as to the exercise of the right to vote because of his race or color.

At Page 16 of Appellants' Brief filed with this Court Appellants state that:

> "[E]arlier in the hearing, he [Mr. Katzenbach] gave examples of changes which would not be covered [by 42 U.S.C. 1973c]—changes in voting age, resident requirements, and balloting procedures such as changing from paper ballots to machine * * *."

Surely, if as Appellants contend in their Brief, these changes are not within the purview of Section 5 of the

Voting Rights Act of 1965 (42 U.S.C. 1973c), then Section 2870, Mississippi Code 1942, as amended, could not conceivably fall within the purview of said Section 5 of the Act.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court in *South Carolina* v. *Katzenbach*, supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Section 2870, Mississippi Code 1942, as amended, in no way denies or abridges the right of Appellants to vote because of race or color as prohibited by the Fifteenth Amendment to the Constitution of the United States. In response to the teachings of *Baker* v. *Carr*, 369 U.S. 186, and *Reynolds* v. *Sims*, 377 U.S. 533, and their progeny, the Mississippi Legislature during its regular session of 1966, exercising its legislative wisdom under and by virtue of Section 170 of the Mississippi Constitution of 1890, amended Section 2870 of the Mississippi Code of 1942. Although this Court had not at that time held that a County political subdivision was compelled under the equal protection clause to redistrict itself on an equal basis, the United States District Courts of Mississippi have held that such was portended by such teachings of this Court.

The adoption of Orders by the Adams and Forrest Counties Boards of Supervisors whereby the Members of said Boards were to be voted upon by the electorate of each County at large brought these Counties within the ambit of the rationale of *Baker* v. *Carr*, supra, and *Reynolds* v. *Sims*; supra. The rule of "one-man, one-vote," is now a reality in the Counties of Adams and Forrest.

Appellants' right to vote has in no way been denied or abridged by the actions of the Appellees' Boards. Rather than having their votes diluted, as argued by the Appellants, the power of their votes has been increased. Whereas before a voter in a District only cast a vote for a candidate residing in his District under the present method of electing Members of the Boards of Supervisors of Adams and Forrest Counties the same voter cast a ballot for four additional candidates. Under the law of Mississippi the Board of Supervisors can only act as a unit, and then only when the Sheriff and Clerk of the Board are in attendance. (Section 2873, Mississippi Code 1942) This voter can now exert on and have his voting influence felt by not only one member of the Board of Supervisors, but on all five of the members. As stated by this Court in *Fortson* v. *Dorsey*, 379 U.S. 433:

> "Each District's Senator must be a resident of that District, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interest of all the people in the county, and not merely those of people in his home district; thus, in fact he is the county's and not merely the District's Senator."

The Amendment to Section 2870, Mississippi Code 1942, authorizes changes in the method of electing Members to the Boards of Supervisors similar to changes which occur in legislative and congressional reapportionment.

The Congressional Redistricting Statute passed by the Mississippi Legislature effective during the 1966 Congressional election was held to be valid and constitutional by an unpublished opinion of the District Court and affirmed by this Court. *Connor, et al.* v. *Johnson, et al.*, No. 999 (1967) 386 U.S. 483.

South Carolina v. *Katzenbach*, supra, stated with clarity that South Carolina, Alabama, Alaska, Georgia,

Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina and one county in Arizona had been brought within the coverage formula of the Voting Rights Act of 1965 on August 7, 1965. Subsequent to that time legislative apportionment and/or congressional redistricting have been before the Courts in each of those States. South Carolina—*O'Shields* v. *McNair*, 254 F. Supp. 708; Alaska—*Wade* v. *Nolan*, 414 P.2d 689; Georgia—*Tombs* v. *Fortson*, 241 F. Supp. 65, aff., 384 U.S. 210 (May 16, 1966); Louisiana—*Bannister* v. *Davis*, 263 F. Supp. 202; Mississippi—*Connor* v. *Johnson*, supra; Virginia—*Mann* v. *Davis*, 245 F. Supp. 241, aff., 382 U.S. 42 (October 25, 1965); North Carolina—*Drum* v. *Seawell*, 249 F. Supp. 877, aff., 383 U.S. 831 (April 4, 1966); and Arizona—*Klahr* v. *Goddard*, 250 F. Supp. 537.

Some of the cases as above noted were considered and reviewed by this Court. It is significant that such changes, both by the Legislatures of the States covered and the Courts of those States, were in total disregard of the proscriptive provisions of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). It is submitted that the reason for this is that such proscriptive provisions were not even thought to apply to these changes. This Court and the Members thereof were well aware of the Voting Rights Act of 1965 and the provisions of Section 5 thereof, having dealt with said Act in *South Carolina* v. *Katzenbach*, supra, decided March 7, 1966. Although this question was not presented in the aforementioned cases, under familiar principles, the cases would have been decided on the basis of law controlling at the time the Court rendered its decisions, and therefore the provisions of Section 5 of the Voting Rights Act of 1965 would have been applicable to these litigations. *Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184. *United States* v. *Alabama*, 362 U.S. 602. Thus, this Court, in exercising jurisdiction in the above men-

tioned cases, sub silentio, *decided that changes in regard to congressional redistricting and legislative reapportionment were not within the purview of Section 5 of the Voting Rights Act of 1965.*

This Court approved a method of electing members of the City Council of Virginia Beach, Virginia, similar to the method of electing Members to the Boards of Supervisors of Adams and Forrest Counties. *Dusch, et al.* v. *Davis, et al.*, 18 L.Ed.2d 656. The method used by Virginia Beach, Virginia, was under a charter amendment enacted during the 1966 session of the Virginia State Legislature. Virginia, like Mississippi, is controlled by the proscriptive provision of Section 5 of the Voting Rights Act of 1965.

Virginia Beach, Virginia, did not submit the change in its method of electing city councilmen to the Attorney General of The United States nor did it have said method approved by the United States District Court for the District of Columbia. This plan, enacted after November 1, 1964, was approved by the United States District Court for the Eastern District of Virginia, disapproved by the United States Court of Appeals for the Fourth Circuit and then *approved by this Court in a decision dated May 22, 1967.*

If this change in the method of electing councilmen of Virginia Beach, Virginia, which is almost identical to the change adopted in Adams and Forrest Counties, Mississippi, comes within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c), then the United States District Court for the Eastern District of Virginia lacked jurisdiction to entertain this cause of action. Jurisdiction for the approval of a change in the voting procedure of a state or political subdivision, thereof, enacted or enforced after November 1, 1964, when said state or political subdivision is controlled by Section 5 of the Voting Rights Act of 1965, is in a court of three judges in the United States

District Court for the District of Columbia only, as provided by the Act. This court would have lacked jurisdiction to entertain the appeal since the District Court lacked jurisdiction and, therefore, would have been compelled to dismiss the appeal upon the court's own motion; the court and the members thereof being well aware of the Voting Rights Act of 1965, and Section 5, thereof, having had said act before them in *South Carolina* v. *Katzenbach*, supra, decided March 7, 1966. We suggest to the Court that since this court was aware that Virginia was brought within the coverage formula of the act on August 7, 1965, in approving the Virginia Beach, Virginia, change, this Court, sub silentio, found that such change did not come within the purview of Section 5 of the Voting Rights Act of 1965. We further suggest to the court that since the change enacted in 1966 by the legislature of Virginia allowing Virginia Beach, Virginia, to elect seven members of its city councilmen at large, while requiring at least one member to reside in each of the seven boroughs, is perfectly analogous to Section 2870, Mississippi Code, as amended, by which the Legislature of Mississippi in 1966 allowed the Counties of Mississippi to provide that the five members of the county boards of supervisors be elected at large while requiring one member to reside in each of the five districts of the county. Therefore, we respectfully submit to the Court that Section 2870, Mississippi Code, as amended, and the actions taken thereunder, and pursuant thereto, by the counties of Adams and Forrest, appellees herein, do not come within the purview of, and are not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c).

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily reveals that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending

by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). This was a three judge court of Alabama, composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon the grounds that: (1.) That portion of the act had an apparent discriminatory effect; and, (2.) That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (U.S.C. 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number 536 which extended the terms of the incumbent commissioners should be enjoined because the effect thereof was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c), admitted at page 918 of 253 F. Supp. that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that Section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

The action taken by the Alabama State Legislature is in no way similar to Section 2870 of the Mississippi Code, as amended, and the actions taken thereunder, and by virtue thereof, by the counties of Adams and Forrest.

In the event the appellants' position should be sustained, then the effect, thereof, would be to overrule the decisions of this Court pertaining to the "one man, one vote" rule in the cases previously before this Court originating in those states covered by the Voting Rights Act of 1965. Further such holding would preclude any future litigation in the states covered by the Act as it pertains to complying with the mandates of this Court in reapportionment so as to have a truly representative form of government. To so hold would mean that the Congress, through the Voting Rights Act of 1965, has withdrawn from the local District Courts of the several states covered by Section 5 of the said Voting Rights Act jurisdiction to entertain such litigation by denying them the authority to approve or disapprove any actions taken by such states or political subdivisions, thereof, whereby said states or political subdivisions realign boundaries of voting districts so as to accomodate them to this Court's "one-man, one-vote" mandate.

We suggest to the Court that it is very significant that at all times during the Congressional Hearings and the debates on the floor of Congress whenever Section 5 of the Act was mentioned, the examples referred to by all individuals were examples dealing entirely with qualifica-

tions and procedures involving directly registration and/or voting. At no time did anyone ever mention reapportionment or redistricting as being covered by the said Section 5 of the said Act. In light of the fact that reapportionment and redistricting was at that time and is now a very live issue, the absence of any question directed to this issue appears highly significant.

This is especially so since on several occasions during the said Congressional Committee Hearings the Attorney General equated the legislative suspension of state voting laws with the principle of equity applied by the Federal Courts in reapportionment suits. (See House Hearings, Page 94 and Senate Hearings 237) But even though reapportionment was alluded to, no one asked or intimated that such was covered by the Act.

Moreover, to sustain the appellants' position would prevent the realignment of school districts, sometimes necessary in order to comply with the school segregation cases of *Brown* v. *Board of Education*, 347 U.S. 483, and 349 U.S. 294; *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, and *Green* v. *County School Board of New Kent County*, ... U.S. ....., 20 L.Ed.2d 716.

In Mississippi and other states covered by the provisions of the Voting Rights Act of 1965, school trustees are elected by the qualified electors from the school districts and bond issues are voted on only by the persons living within a defined district, all of which have existed in the laws of Mississippi prior to November 1, 1964.

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce individual rights under the Fifteenth Amendment to the extent of defeating other rights guaranteed under the Fourteenth Amendment.

V.

This Court Should Not Set Aside the Elections Held Pursuant to Section 2870 of the Mississippi Code, As Amended, Even in the Event This Court Should Find That Said Section 2870, As Amended, Comes Within the Purview of Section 5 of the Voting Rights Act of 1965

In support of their contention that in the event this Court should find that Section 2870 of the Mississippi Code, as Amended, comes within the purview of Section 5 of the Voting Rights Act of 1965, this Court should set aside the elections held pursuant to said Section 2870, Appellants cite *Hamer* v. *Campbell*, 358 F.2d 215. *Hamer* does not support Appellants' position, but in fact, supports the position of the Appellees. This Court is committed to the proposition that "equitable considerations might justify a Court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Reynolds* v. *Sims*, 377 U.S. 533. This Court further stated in *Reynolds* that:

> "[W]ith respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.'" (Page 585)

It is significant to note that in *Hamer* v. *Campbell*, supra, Circuit Judge Brown distinguished this Court's holding in *Reynolds* v. *Sims*, supra, on the ground that *Hamer* was concerned with the deprivation of the right to vote while *Reynolds* was concerned with dilution of the vote. The Circuit Court of Appeals for the Fifth Circuit

made other distinctions as to reapportionment cases. The Court stated at Page 222 that:

> "[A] court may properly withhold injunctive relief in order to allow the state to remedy dilution of the franchise."

We submit to the Court that even in the event that this Court finds that the said Section 2870 comes within the purview of Section 5 of the Voting Rights Act of 1965 that the only relief that should be granted would be relief directed toward the next elections involving the Supervisors of Forrest and Adams Counties. This comports with the rationale of *Sims* v. *Reynolds,* supra, *Roman* v. *Sincock,* 377 U.S. 695 and *Davis* v. *Mann,* 377 U.S. 678.

CONCLUSION

Appellees therefore respectfully submit that this Court must either dismiss these appeals for lack of jurisdiction or affirm the decision of District Court for the Southern District of Mississippi, Jackson Division, three judges sitting.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 26

CHARLES E. BUNTON, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

VERNON TOM GRIFFIN, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

SETH BALLARD, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Jurisdiction—Whether Three-Judge District Court was properly convened.

2. Whether the District Court erred:

(a) In finding that Section 6271-08 of the Mississippi Code, as amended by the 1966 session of the Mississippi Legislature, does not come within the purview of, and is not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. Section 1973c) so as to require compliance with said Section 5 by the State of Mississippi and the counties involved in each of the cases herein on appeal, prior to enforcing or applying Section 6271-08 as amended; and

(b) In dismissing each of the complaints, thereby denying the relief requested therein.

3. Whether the November 7, 1967, election in each of the counties herein involved having been held in accordance with Section 6271-08, as amended (i.e., no election for County Superintendent having been held), this Court, if it finds that Section 5 of the Voting Rights Act of 1965 should have been complied with as aforesaid, should order an election of such County Superintendent of Education pursuant to the provisions of Section 6271-08 prior to its amendment in 1966.

STATEMENT OF THE CASE

These consolidated cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 6271-08 of the Mississippi Code.

Appellants in their original Complaint asserted a second claim for relief claiming that the Amendment to Section 6271-08 of the Mississippi Code, and the actions taken pursuant thereto by the Appellees, had the purpose and effect of denying or abridging on account of race or color the right to vote of the individual Appellants and the class they purported to represent, and further charged said actions prevented the election of Negro candidates to the office of Superintendent of Education; and further charged

that the said actions prevented potential Negro candidates from holding the office of Superintendent of Education in said counties in violation of the Fourteenth and Fifteenth Amendments to the Constitution. This second claim was *dismissed upon the voluntary Petition for Dismissal by the Appellants.*

ARGUMENT

I.

Jurisdiction—Whether Three-Judge District Court Was Properly Convened

The threshold question before the Court, the consideration of which was postponed to the merits, is whether this Court, rather than the Court of Appeals, has jurisdiction to review the District Court's determination, and this in turn depends on whether a three-judge court was required. Appellants assert that it was not.

The authority, if it exists, for convening the three-judge district court in these actions must be conferred by Section 5 of the Voting Rights Act of 1965. (42 U.S.C. 1973c) The question of the convening of three-judge district courts in these actions outside the authority conferred, if such authority is conferred by Section 5 of the Voting Rights Act, is foreclosed by this Court's decision in *Swift & Co.* v. *Wickham,* 382 U.S. 111.

All counsel at bar appear to be in accord that the jurisdiction of the Three-Judge District Court and thereby the jurisdiction of this Court rest upon the construction to be given the last sentence of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) here quoted for ready reference by the Court:

> "Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

Section 5 of the Act provides for only one kind of action—an action by a state or its political subdivisions with respect to which the prohibition set forth in Section 4(a) is in effect for a declaratory judgment that any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, which said state or political subdivision enacts or seeks to administer does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Section 5 further provides, and all counsel at bar agree, that the court before which said action shall be heard is the United States District Court for the District of Columbia, and that said Court shall be a three-judge court and any appeal shall lie to this Court.

The quoted language of Section 5 is plain and unambiguous. The phrase, "any action under this Section" can only mean any action the institution of which is authorized by and instituted pursuant to the provisions of said Section. Far from Appellants' contention that the phrase "any action" suggests more than a declaratory judgment action, the phrase in its ordinary and accepted meaning unequivocally limits the mandate for a three-judge court to actions "under" or pursuant to this Section.

Appellants, in their Brief, adopt the rationale of MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE, pages 8 and 9. There the Solicitor General urges that since the above quoted language of Section 5 is separated from the opening sentence of the Section, its location has some significance. Appellees submit that not only does the sentence appear in the most

logical place, but that its location lends support to the argument that it was the intention of Congress that the language apply to no actions other than actions for declaratory judgments. Moreover, it is clear that the phrase "any action" as contained in Section 5 applies only to the actions authorized by the Section since the sentence is not even a separate paragraph within the Section but is a part of the one paragraph which makes up the entire body of Section 5. In fact, the quoted sentence is in no manner separated from the body of the Section.

If Congress had intended, as Appellants urge, that jurisdiction be conferred on the three-judge court in the instant case, the statute, too easily, could have been drafted to so provide. Appellants argue that the last sentence of Section 5 must be read to permit a suit by aggrieved individuals alleging a violation of Section 5 to be filed in the district court of the district in which violation by a state or its subdivision is alleged to have occurred and that thereupon the district judge must convene a court of three judges to hear the suit. Nowhere in Section 5 can be found a mention of any court other than the United States District Court for the District of Columbia. Section 5 is a specific enlargement of the general jurisdiction of the Federal Courts. In enacting Section 5, Congress did so in light of the provision of Section 2281 (28 U.S.C.). To adopt the construction of the last sentence of Section 5 urged by Appellants is to engraft by strained inference upon the jurisdiction of United States States district courts other than that of the District of Columbia a special and an enlarged jurisdiction without express provision therefor in the statute.

The Section, as written, contains no enforcement provision. As a matter of fact, the only provision for enforcement of Section 5 that appears in the Act is Section

12(d) and that provision authorizes only the United States Attorney General to institute "an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes." Paragraph (f) of the same Section provides that the district courts of the United States shall have jurisdiction of such proceedings. It does not provide for a three-judge court as does Section 10(c) for action brought under Section 10. It must be concluded that the only enforcement of Section 5 contemplated by the Act is pursuant to Section 12(d) and further, in the absence of a specific recitation by Congress providing for a three-judge court, that all enforcement proceedings shall be vested in the United States district courts, one judge sitting.

Appellants allude to the language in Section 5 of the Act, "subsequent action to enjoin enforcement of such qualification." This language is taken out of context and thereby loses its meaning completely. Said language was inserted in Section 5 of the Act to make plain that the Attorney General could bring a subsequent action to enjoin the enforcement of such qualification, prerequisite, standard, practice or procedure, if said enforcement was in violation of the Constitution of the United States. Appellants assert that "such an action would be under the Fifteenth Amendment, and would, therefore require a three-judge court under 28 U.S.C. Section 2281 in any event," therefore making the last sentence of the paragraph superfluous. This contention is without merit since the said subsequent action by the Attorney General contemplated by the above quoted language would be based not upon the ground that the qualification, pre-

requisite, standard, practice or procedure is unconstitutional, but that they are enforced in an unconstitutional manner. It is elemental that 28 U.S.C. 2281 does not control an action wherein the ground for said action is unconstitutional enforcement rather than unconstitutionality of the law itself. *Phillips* v. *United States,* 312 U.S. 246.

The Court's attention is invited to Section 14(b) of the Act. We find therein the language that:

> "[N]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any *declaratory judgment* pursuant to . . . Section 5 . . .". (Emphasis added)

Since the actions now on review before this Court are actions requesting declaratory judgments if such are "under" or "pursuant to" Section 5 of the Act, then jurisdiction to hear said actions would rest exclusively in the District Court for the District of Columbia. Said Section 14(b), if it means what it says, would appear to be the death knell to Appellants' argument that the present actions were brought "under" or "pursuant to" Section 5 of the Act.

Appellants assert in their Brief that:

> "[T]he purpose of the Voting Rights Act of 1965 and of three-judge courts in general support Appellants' contention that all actions related to Section 5 must be heard by a three-judge court."

This statement vividly points up Appellants' apparent misconception of the thrust of the said Act and the legal and constitutional theories upon which the Act was predicated. The proviso in Section 5 of the Act which requires a state or political subdivision to first obtain the approval of the Attorney General or in the absence of

such approval, the approval of the United States District Court for the District of Columbia before enacting or administering voting laws different from those in effect prior to November 1, 1964, is based upon the "freezing" principle. A suit by the Attorney General, as contemplated by Section 5 of the Act, to enjoin the operation and enforcement of new voting laws until such laws are first submitted to the Attorney General or the United States District Court for the District of Columbia does not draw into question the constitutionality of such voting laws, and therefore does not come within the ambit of the concern expressed by Congress in the enactment of 28 U.S.C. 2281. The actions now before this Court are not actions seeking an injunction against the enforcement of Section 6271-08, Mississippi Code, Annotated, 1942, as amended, on the ground that said Section or said actions are unconstitutional. This Court is not here confronted with a combat or clash between the sovereign state and/or political subdivision thereof and individuals in the constitutional arena. It is worthy to note that in actions brought by the United States under 42 U.S.C. 1971 in which the Attorney General requests a finding of a pattern or practice of discrimination, the Attorney General or any Defendant in such actions may request that a court of three judges be convened to hear and determine the entire cases. This proviso was inserted in said Section 1971 because the United States District Courts hearing and determining such cases could suspend, if they deemed necessary, certain voting laws of a state or political subdivision or portions thereof. But before the Courts could suspend such laws they must first find that such laws were being unconstitutionally administered. In the actions now before the Court no such finding is necessary, therefore such actions do not even rise to the same dignity as those under 42 U.S.C. 1971. Even under

said Section 1971 the convening of a three-judge district court was not mandatory.

It was necessary to place in Section 5 of the Act the proviso in regard to the convening of a court of three judges because the court action contemplated by said Section is one whereby, as a practical matter, an adverse finding as to the Plaintiff by the United States District Court for the District of Columbia would be tantamount to the issuance of an injunction enjoining the enforcement and operation of certain state laws because they have the purpose and will have the effect of denying or abridging the right to vote on account of race or color. Though this would be the practical effect of such a holding by the said District Court it would not technically come within the provisions of 28 U.S.C. 2281 because no judicial injunction is sought or issued since the injunction against the enforcement of such laws is the legislative injunction contained in the Act. Therefore, Congress deemed it appropriate to assert in said Section 5 of the Act, the last sentence which is now before this Court for construction. The congressional concern for this technical point is evidenced by the colloquy between Senator Ervin and Attorney General Katzenbach found at Pages 48-49 of the Hearings Before the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, First Session, which though directed to Section 4(a) of the Act is equally applicable to Section 5. A portion of said colloquy is here quoted for the benefit of the Court:

> "SENATOR ERVIN. But that is what the district court is here for, to determine whether denial or abridgment has occurred. At least, theoretically, they are here to give a person a chance to prove that he has not done that.

ATTORNEY GENERAL KATZENBACH. Senator, my reason for interpreting it this way would be that you do not get that kind of a judgment under this procedure in a previous paragraph. The only thing you can get under it is a declaratory judgment that you have not. You do not get a judgment that you have. Therefore, I would not have thought that this would have applied. But if the point is not clear, we ought to make it clear, I agree with you.

They seek a declaratory judgment that they have not; there is evidence that they have. The court denies the declaratory judgment that they have not. There is no judgment made that they have.

SENATOR ERVIN. The issue which is supposed to be raised is whether you have abridged or denied anybody's right to vote on account of race or color? Is that not the issue that is put in the bill?"

Further, at Page 71 of said Hearings, we find the following colloquy between Senator Ervin and Attorney General Katzenbach:

"SENATOR ERVIN. Is it the purpose of this bill to deny the district judge the right to try one of these cases by him or based upon—

ATTORNEY GENERAL KATZENBACH. No. I think the three-judge court is surely appropriate. You are testing here a constitutional question—

SENATOR ERVIN. And I—

ATTORNEY GENERAL KATZENBACH (continuing). On denial or abridgment. It goes into the 15th amendment question and I think the use of the three-judge court is quite appropriate. I didn't mean to cast any aspersions by drafting it this way."

On several occasions courts in the Fifth Circuit have determined the question as to what actions taken by a state or political subdivision thereof come within the purview of

the Voting Rights Act of 1965 without convening a court of three judges. In *Davis* v. *Gallinghouse,* 246 F. Supp. 208, a one-judge district court determined that documentation of residence did not come within the Voting Rights Act ban on tests and devices. In *United States* v. *Ward,* C.A. La., 1965, 352 F.2d 359 and *United States* v. *Ramsey,* C.A. Miss., 1965, 353 F.2d 650, the Court of Appeals for the Fifth Circuit remanded cases to one-judge district courts to enjoin the enforcement and operation of certain state statutes on the ground that they came within the proscription of the Voting Rights Act of 1965.

None of the reasons which brought about the enactment by Congress of 28 U.S.C. 2281 underlay an action wherein the conflict is between a state statute and a federal statute rather than a state statute and the Constitution of the United States. In the actions now before this Court the conflict is between a state statute and actions thereunder and a federal statute and do not involve a conflict between a state statute and actions thereunder and the Constitution of the United States.

II.

Section 6271-08 of the Mississippi Code As Amended by the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965

(42 U.S.C.A. Section 1973c.)

These actions were purportedly brought by two classes of individuals. One class represents individuals who seek or desire to seek the Office of Superintendent of Education and the other class represents the individual voters of the counties involved. As to the class representing the candidates, we submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit

that the colloquy between Representative Corman and the Honorable Burke Marshall found at page 74 of the Hearings Before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty Ninth Congress, First Session on H.R. 6400, Serial No. 2, and here set out for the convenience of the Court, forecloses further argument in this regard.

> "MR. CORMAN: We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964: Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?
>
> MR. MARSHALL: The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."

As to the remaining class purported to be represented in these actions, we submit to the Court that Section 6271-08, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A. 1973c) The Voting Rights Act of 1965 is entitled "An Act To Enforce The Fifteenth Amendment To The Constitution Of The United States And For Other Purposes". The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General

of the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

> "This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.
>
> This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.
>
> It will provide for citizens to be registered by officials of the U. S. Government if the State officials refuse to register them.
>
> It will eliminate tedious, unnecessary lawsuits which delay the right to vote.
>
> Finally, this legislation wil insure that properly registered individuals are not prohibited from voting." (Emphasis added)

These consolidated cases involve a question that turns upon construction of a Federal Statute. Most relevant to the construction of a federal statute is the very language in which Congress has expressed its policy and from which the court must extract the meaning most appropriate. *Local 1976, U. B. C. & J.* v. *N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011.

Section 5 uses the words, "Qualification," "Prerequisite," "Standard," "Practice," or "procedure" five different times. They do, in each instance where they are used, refer only to "voting", which is defined in the Act by Section 14c thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be cast, counted,

". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words "qualification," "prerequisite", "standard," "practice," or "procedure" are to be applied exclusively to "vote" or "voting," as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis', that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579.

We submit to the Court that the above quoted words, "from the company they keep" are limited as they apply to "vote" or "voting" and do not apply to the candidates who are voted upon.

The Amendment to Section 6271-08 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing with vote or voting, but deals exclusively and solely with the method by which the Superintendent of Education of a county will be chosen. Determination of the method by which a non legislative official is to be elected or appointed is a matter within the inherent and exclusive jurisdiction of the states and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 86 S.Ct. 803, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is directed to one of these mechanisms which is contained in Section 5 of the Act (42 U.S.C.A. 1973c). This Section contains the proviso that in the event a state or political subdivision shall enact or seek to administer any voting or standard, practice or procedure, with respect to voting different from that in force or effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively or by his failure to object or by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as, "to yield, accommodate, or to adapt one's self to; to act in accordance with". We suggest to the Court that the use of the word, "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice, or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 6271-08 of the Mississippi Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964. It merely provided that County Superintendents of Education in certain counties would be appointed by the Board of Education. This method of selecting a non legislative official is practically identical with the method of selecting a County School Board in Michigan, which was approved by this Court in May, 1967 in *Sailors* v. *Kent Board of Education,* 18 L.Ed.2d 650.

An application of the plain and unambiguous language of the Act of Congress to the Amendment now in question makes it clear that this Amendment is not covered by, or within the purview of, the restriction on new voting regulations imposed by Congress. The Statute, being clear

and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon*, 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278, and *United States* v. *McKesson & Robbins, Inc.*, 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 6271-08, as amended, of the Mississippi Code.

On page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of, "a provision of this kind, you leave it open to a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting,* and we had to litigate the *new qualifications for voting.*" (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C.A. 1973c, appears the following:

> SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"
>
> ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.

It occurred to us that there are other ways in which States can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.

This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered."

ATTORNEY GENERAL KATZENBACH: "Yes, sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices * * *"

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests and devices'. And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right*; and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added)

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

"FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which was precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a commonsense method of insuring that literacy tests and similar devices are not replaced by other vehicles

of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act

on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in Section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator."

The Bill was amended so as to substitute the words "Standards, practices or procedures" in lieu of the simple word "procedure." This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the rights to register to vote; and did not pertain to the method of electing candidates for office.

The sum total of the remarks directed to 42 U.S.C.A. 1973c in the Congressional Committee Hearing and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C.A. Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress

in 42 U.S.C.A. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 6271-08, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C.A. Section 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under 42 U.S.C.A. Section 1973b(a). This clearly shows the intent of Congress to include in the terms "qualifications," "prerequisites," "standards," "practices," or "procedures," only those acts of a State or a political subdivision thereof, which would discriminate as to the exercise of the right to vote because of his race or color.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court, in *South Carolina* v. *Katzenbach*, supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily shows that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. Section 1973c). This was a three judge court of Alabama composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon the grounds that: (1) That portion of the act had an apparent discriminatory effect; and (2) That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (U.S.C.A. Section 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number 536 which extended the terms of the incumbent commissioners should be enjoined because the effect, thereof, was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. Section 1973c), admitted at page 918 of 253 F. Supp., that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

In Mississippi and other states covered by the provisions of the Voting Rights Act of 1965, school trustees are elected by the qualified electors from the school dis-

tricts and bond issues are voted on only by the persons living within a defined district, all of which have existed in the laws of Mississippi prior to November 1, 1964.

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce individual rights under the Fifteenth Amendment to the extent of defeating other rights which states have as announced by this constitution.

For this Court to affirm would in no wise preclude appellants from filing an action in the United States District Court for the Southern District of Mississippi and to assert, therein, invidious discrimination. *Dusch* v. *Davis*, 18 L.Ed.2d 656, 660.

CONCLUSION

In conclusion, it is earnestly urged that the decision of the Three Judge District Court is correct and the Judgment of the District Court should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

SEP 14 1968

JOHN F. DAVIS, CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 36

CLIFTON WHITLEY, ET AL.,
Appellants,

vs.

JOHN BELL WILLIAMS, ET AL.,
Appellees.

BRIEF FOR APPELLEES

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OCTOBER TERM, 1968

No. 36

CLIFTON WHITLEY, ET AL.,
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JOHN BELL WILLIAMS, ET AL.,
Appellees.

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Jurisdiction—Whether Three-Judge District Court was properly convened.

2. Whether the District Court Erred:

(a) In finding that Section 6271-08 of the Mississippi Code, as amended by the 1966 session of the Mississippi Legislature, does not come within the purview of, and is not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. Section 1973c) so as to require compliance with said Section 5 by the State of Mississippi and the counties involved in each of the

cases herein on appeal, prior to enforcing or applying Section 6271-08 as amended; and

(b) In dismissing each of the complaints, thereby denying the relief requested therein.

STATEMENT OF THE CASE

This case deals solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 3260 of the Mississippi Code, as amended.

Appellants, in their original Complaint, charged that Section 3260 of the Mississippi Code, as amended; being House Bill 68 of the Laws of the 1966 Session of the Legislature, violates 42 U.S.C. 1971(a) and the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in addition to coming within the purview of Section 5 of the Voting Rights Act of 1965. These claims were completely eliminated by the stipulation entered into prior to the final judgment of the District Court. (Pages 38 and 39, Appendix)

ARGUMENT

I.

Jurisdiction—Whether Three-Judge District Court Was Properly Convened.

The threshold question before the Court, the consideration of which was postponed to the merits, is whether this Court, rather than the Court of Appeals, has jurisdiction to review the District Court's determination, and this in turn depends on whether a three-judge court was required. Appellants assert that it was not.

The authority, if it exists, for convening the three-judge district court in these actions must be conferred by

Section 5 of the Voting Rights Act of 1965. (42 U.S.C. 1973c) The question of the convening of three-judge district courts in these actions outside the authority conferred, if such authority is conferred by Section 5 of the Voting Rights Act, is foreclosed by this Court's decision in *Swift & Co.* v. *Wickham*, 382 U.S. 111.

All counsel at bar appear to be in accord that the jurisdiction of the Three-Judge District Court and thereby the jurisdiction of this Court rest upon the construction to be given the last sentence of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) here quoted for ready reference by the Court:

> "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

Section 5 of the Act provides for only one kind of action—an action by a state or its political subdivisions with respect to which the prohibition set forth in Section 4(a) is in effect for a declaratory judgment that any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, which said state or political subdivision enacts or seeks to administer does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Section 5 further provides, and all counsel at bar agree, that the court before which said action shall be heard is the United States District Court for the District of Columbia, and that said Court shall be a three-judge court and any appeal shall lie to this Court.

The quoted language of Section 5 is plain and unambiguous. The phrase, "any action under this Section" can

only mean any action the institution of which is authorized by and instituted pursuant to the provisions of said Section. Far from Appellants' contention that the phrase "any action" suggests more than a declaratory judgment action, the phrase in its ordinary and accepted meaning unequivocally limits the mandate for a three-judge court to actions "under" or pursuant to this Section.

If Congress had intended, as Appellants urge, that jurisdiction be conferred on the three-judge court in the instant case, the statute, too easily, could have been drafted to so provide. Appellants argue that the last sentence of Section 5 must be read to permit a suit by aggrieved individuals alleging a violation of Section 5 to be filed in the district court of the district in which violation by a state or its subdivision is alleged to have occurred and that thereupon the district judge must convene a court of three judges to hear the suit. Nowhere in Section 5 can be found a mention of any court other than the United States District Court for the District of Columbia. Section 5 is a specific enlargement of the general jurisdiction of the Federal Courts. In enacting Section 5, Congress did so in light of the provision of Section 2281. (28 U.S.C.) To adopt the construction of the last sentence of Section 5 urged by Appellants is to engraft by strained inference upon the jurisdiction of United States district courts other than that of the District of Columbia a special and an enlarged jurisdiction without express provision therefor in the statute.

The Section, as written, contains no enforcement provision. As a matter of fact, the only provision for enforcement of Section 5 that appears in the Act is Section 12(d) and that provision authorizes only the United States Attorney General to institute "an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including

an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes." Paragraph (f) of the same Section provides that the district courts of the United States shall have jurisdiction of such proceedings. It does not provide for a three-judge court as does Section 10(c) for action brought under Section 10. It must be concluded that the only enforcement of Section 5 contemplated by the Act is pursuant to Section 12(d) and further, in the absence of a specific recitation by Congress providing for a three-judge court, that all enforcement proceedings shall be vested in the United States district courts, one judge sitting.

Appellants allude to the language in Section 5 of the Act, "subsequent action to enjoin enforcement of such qualification." This language is taken out of context and thereby loses its meaning completely. Said language was inserted in Section 5 of the Act to make plain that the Attorney General could bring a subsequent action to enjoin the enforcement of such qualification, prerequisite, standard, practice or procedure, if said enforcement was in violation of the Constitution of the United States. Appellants assert that "such an action would be under the Fifteenth Amendment, and would, therefore require a three-judge court under 28 U.S.C. Section 2281 in any event," therefore making the last sentence of the paragraph superfluous. This contention is without merit since the said subsequent action by the Attorney General contemplated by the above quoted language would be based not upon the ground that the qualification, prerequisite, standard, practice or procedure is unconstitutional, but that they are enforced in an unconstitutional manner. It is elemental that 28 U.S.C. 2281 does not control an action wherein the ground for said action is unconstitutional enforcement rather than uncon-

stitutionality of the law itself. *Phillips* v. *United States*, 312 U.S. 246.

The Court's attention is invited to Section 14(b) of the Act. We find therein the language that:

> "[N]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any *declaratory judgment* pursuant to . . . Section 5 . . .". (Emphasis added)

Since the actions now on review before this Court are actions requesting declaratory judgments if such are "under" or "pursuant to" Section 5 of the Act, then jurisdiction to hear said actions would rest exclusively in the District Court for the District of Columbia. Said Section 14(b), if it means what it says, would appear to be the death knell to Appellants' argument that the present actions were brought "under" or "pursuant to" Section 5 of the Act.

Appellants assert in their Brief that:

> "[T]he purpose of *the Voting Rights Act of 1965 and* of three-judge courts in general support Appellants' contention that all actions related to Section 5 must be heard by a three-judge court."

This statement vividly points up Appellants' apparent misconception of the thrust of the said Act and the legal and constitutional theories upon which the Act was predicated. The proviso in Section 5 of the Act which requires a state or political subdivision to first obtain the approval of the Attorney General or in the absence of such approval, the approval of the United States District Court for the District of Columbia before enacting or administering voting laws different from those in effect prior to November 1, 1964, is based upon the "freezing" principle. A suit by the Attorney General, as contemplated by Section 5 of the Act, to enjoin the operation and enforcement of new voting laws

until such laws are first submitted to the Attorney General or the United States District Court for the District of Columbia does not draw into question the constitutionality of such voting laws, and therefore does not come within the ambit of the concern expressed by Congress in the enactment of 28 U.S.C. 2281. The actions now before this Court are not actions seeking an injunction against the enforcement of Section 6271-08, Mississippi Code, Annotated, 1942, as amended, on the ground that said Section or said actions are unconstitutional. This Court is not here confronted with a combat or clash between the sovereign state and/or political subdivision thereof and individuals in the constitutional arena. It is worthy to note that in actions brought by the United States under 42 U.S.C. 1971 in which the Attorney General requests a finding of a pattern or practice of discrimination, the Attorney General or any Defendant in such actions may request that a court of three judges be convened to hear and determine the entire cases. This proviso was inserted in said Section 1971 because the United States District Courts hearing and determining such cases could suspend, if they deemed necessary, certain voting laws of a state or political subdivision or portions thereof. But before the Courts could suspend such laws they must first find that such laws were being unconstitutionally administered. In the actions now before the Court no such finding is necessary, therefore such actions do not even rise to the same dignity as those under 42 U.S.C. 1971. Even under said Section 1971 the convening of a three-judge district court was not mandatory.

It was necessary to place in Section 5 of the Act the proviso in regard to the convening of a court of three judges because the court action contemplated by said Section is one whereby, as a practical matter, an adverse finding as

to the Plaintiff by the United States District Court for the District of Columbia would be tantamount to the issuance of an injunction enjoining the enforcement and operation of certain state laws because they have the purpose and will have the effect of denying or abridging the right to vote on account of race or color. Though this would be the practical effect of such a holding by the said District Court it would not technically come within the provisions of 28 U.S.C. 2281 because no judicial injunction is sought or issued since the injunction against the enforcement of such laws is the legislative injunction contained in the Act. Therefore, Congress deemed it appropriate to assert in said Section 5 of the Act, the last sentence which is now before this Court for construction. The congressional concern for this technical point is evidenced by the colloquy between Senator Ervin and Attorney General Katzenbach found at Pages 48-49 of the Hearings Before the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, First Session, which though directed to Section 4(a) of the Act is equally applicable to Section 5. A portion of said colloquy is here quoted for the benefit of the Court:

> "SENATOR ERVIN: But that is what the district court is here for, to determine whether denial or abridgment has occurred. At least, theoretically, they are here to give a person a chance to prove that he has not done that.
>
> ATTORNEY GENERAL KATZENBACH: Senator, my reason for interpreting it this way would be that you do not get that kind of a judgment under this procedure in a previous paragraph. The only thing you can get under it is a declaratory judgment that you have not. You do not get a judgment that you have. Therefore, I would not have thought that this would have applied. But if the point is not clear, we ought to make it clear, I agree with you.

They seek a declaratory judgment that they have not; there is evidence that they have. The court denies the declaratory judgment that they have not. There is no judgment made that they have.

SENATOR ERVIN: The issue which is supposed to be raised is whether you have abridged or denied anybody's right to vote on account of race or color? Is that not the issue that is put in the bill?"

Further, at Page 71 of said Hearings, we find the following colloquy between Senator Ervin and Attorney General Katzenbach:

"SENATOR ERVIN: Is it the purpose of this bill to deny the district judge the right to try one of these cases by him or based upon—

ATTORNEY GENERAL KATZENBACH: No. I think the three-judge court is surely appropriate. You are testing here a constitutional question—

SENATOR ERVIN: And I—

ATTORNEY GENERAL KATZENBACH (continuing): On denial or abridgment. It goes into the 15th amendment question and I think the use of the three-judge court is quite appropriate. I didn't mean to cast any aspersions by drafting it this way."

On several occasions courts in the Fifth Circuit have determined the question as to what actions taken by a state or political subdivision thereof come within the purview of the Voting Rights Act of 1965 without convening a court of three judges. In *Davis* v. *Gallinghouse*, 246 F. Supp. 208, a one judge district court determined that documentation of residence did not come within the Voting Rights Act ban on tests and devices. In *United States* v. *Ward*, C.A. La., 1965, 352 F.2d 359 and *United States* v. *Ramsey*, C.A. Miss., 1965, 353 F.2d 650, the Court of Appeals for the Fifth Circuit remanded cases to one judge district

courts to enjoin the enforcement and operation of certain state statutes on the ground that they came within the proscription of the Voting Rights Act of 1965.

None of the reasons which brought about the enactment by Congress of 28 U.S.C. 2281 underlay an action wherein the conflict is between a state statute and a federal statute rather than a state statute and the Constitution of the United States. In the actions now before this Court the conflict is between a state statute and actions thereunder and a federal statute and do not involve a conflict between a state statute and actions thereunder and the Constitution of the United States.

II.

Section 3260 of the Mississippi Code As Amended by the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A., Section 1973c)

This suit is brought by a group of individuals purporting to represent a class of individuals who seek or desire to become candidates for various public offices in Mississippi. We submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit that the colloquy between Representative Corman and the Honorable Burke Marshall found at page 74 of the Hearings Before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty Ninth Congress, First Session on H.R. 6400, Serial No. 2, and here set out for the convenience of the Court, forecloses further argument in this regard.

> "MR. CORMAN: We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964.

Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?'

MR. MARSHALL: 'The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort I would like to see it corrected, but that is not what we were trying to deal with in the bill.'"

We submit to the Court that Section 3260, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A. 1973c) The Voting Rights Act of 1965 is entitled, "An Act to Enforce the Fifteenth Amendment to the Constitution of the United States and for Other Purposes." The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General of the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

"This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.

This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.

It will provide for citizens to be registered by officials of the U. S. Government if the State officials refuse to register them.

It will eliminate tedious, unnecessary lawsuits which delay the right to vote.

Finally, this legislation will insure that properly registered individuals *are not prohibited from voting.*"

This case involves a question that turns upon construction of a federal statute. Most relevant to the construction of a federal statute is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate. *Local 1976, U.B.C. & J.* v. *N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011.

Section 5 uses the words, "qualification", "prerequisite", "standard", "practice or procedure", five different times. They do, in each instance where they are used, refer only to "voting", which is defined in the Act by Section 14c, thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be cast, counted, ". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words, "qualification", "prerequisite", "standard", "practice or procedure" are to be applied exclusively to "vote" or "voting", as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

"The maxim 'noscitur a sociis', that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is

> capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579.

We submit to the Court that the above quoted words, "from the company they keep", are limited as they apply to "vote" or "voting", and do not apply to the candidates who are voted upon.

The Amendment to Section 3260 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing with vote or voting, but deals exclusively and solely with the method by which public officers in Mississippi will be chosen. Determination of the method by which a public official is to be elected is a matter within the inherent and exclusive jurisdiction of the states and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 86 S.Ct. 803, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is directed to one of these mechanisms which is contained in Section 5 of the Act. (42 U.S.C.A. 1973c) This Section contains the proviso that in the event a state or political subdivision shall enact or seek to administer any voting or standard, practice or procedure, with respect to voting different from that in force or effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively or by his failure to object or by the United States District Court for the District of Columbia

then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as, "to yield, accommodate, or to adapt one's self to; to act in accordance with". We suggest to the Court that the use of the word "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 3260 of the Mississippi Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964. It merely provides the method by which a candidate for public office can have his name printed on the official ballot.

An application of the plain and unambiguous language of the Act of Congress to the Amendment now in question makes it clear that this Amendment is not covered by, or within the purview of, the restriction on new voting regulations imposed by Congress. The Statute, being clear and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon,* 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278, and *United States* v. *McKesson & Robbins, Inc.,* 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 3260, as amended, of the Mississippi Code.

On page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of

1965, now under scrutiny by this Court, was that in absence of "a provision of this kind, you leave it open to a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting*, and we had to litigate the *new qualifications for voting*." (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C.A. 1973c, appears the following:

> SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"
>
> ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.
>
> It occurred to us that there are other ways in which States can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.
>
> This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered."

ATTORNEY GENERAL KATZENBACH: "Yes, sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices—"

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right;* and we, perhaps, except for the fact that some members of the committee I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things

—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added)

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

"FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which has been precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a common-sense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator."

The Bill was amended so as to substitute the words "standards, practices or procedures" in lieu of the simple word "procedure". This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the rights to register to vote; and did not pertain to the method of electing candidates for office.

The sum total of the remarks directed to 42 U.S.C.A. 1973c in the Congressional Committee Hearing and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C.A. Section 1973b (a)). These tests and devices as shown by the definition placed upon them by Congress in 42 U.S.C.A. 1973b (c) dealt entirely with a person's right to vote and not with any matter controlled by Section 3260, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C.A. Section 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under 42 U.S.C.A. Section 1973b (a). This clearly shows the intent of Congress to include in the terms "qualifications", "prerequisites", "standards", "practices", or "procedures", only those acts of a State or a political subdivision thereof, which would discriminate as to the exercise of the right to vote because of his race or color.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraor-

dinary one. This Court in *South Carolina* v. *Katzenbach*, supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily shows that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. Section 1973c). This was a three judge court of Alabama composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon the grounds that: (1) That portion of the act had an apparent discriminatory effect; and (2) That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (U.S.C.A. Section 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabma Act number 536 was not enacted because of racially, discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number 536 which extended the terms of the incumbent commissioners should be enjoined because the effect, thereof, was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. Section 1973c), admitted at page 918 of 253 F. Supp., that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce individual rights under the Fifteenth Amendment to the extent of defeating other rights which states have as announced by this constitution.

For this Court to affirm would in no wise preclude appellants from filing an action in the United States District Court for the Southern District of Mississippi and to assert therein, invidious discrimination. *Dusch* v. *Davis*, 18 L.Ed.2d 656, 660.

CONCLUSION

In conclusion, it is earnestly urged that the decision of the Three Judge District Court is correct and the Judgment of the District Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 3, 25, 26, AND 36.—OCTOBER TERM, 1968.

Richard Allen et al., Appellants, 3 v. State Board of Elections et al.	On Appeal From the United States District Court for the Eastern District of Virginia.
J. C. Fairley et al., Appellants, 25 v. Joe T. Patterson et al.	On Appeals From the United States District Court for the Southern District of Mississippi.
Charles E. Bunton et al., Appellants, 26 v. Joe T. Patterson et al.	
Clifton Whitley et al., Appellants, 36 v. John Bell Williams et al.	

[March 3, 1969.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These four cases, three from Mississippi and one from Virginia, involve the application of the Voting Rights Act of 1965 [1] to state election laws and regulations. The Mississippi cases were consolidated on appeal and argued together in this Court. Because of the grounds on which we decide all four cases, the appeal in the Virginia case is also disposed of by this opinion.[2]

[1] 79 Stat. 437, 42 U. S. C. § 1973 *et seq.* (1964 ed., Supp. I).

[2] In all four cases a three-judge court was convened. Nos. 25, 26, and 36 are direct appeals from the United States District Court

In *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), we held the provisions of the Act involved in these cases to be constitutional. These cases merely require us to determine whether the various state enactments involved are subject to the requirements of the Act.

We gave detailed treatment to the history and purposes of the Voting Rights Act in *South Carolina* v. *Katzenbach, supra.* Briefly, the Act implemented Congress' firm intention to rid the country of racial discrimination in voting. It provides stringent new remedies against those practices which have most frequently denied citizens the right to vote on the basis of their race. Thus, in States covered by the Act,[3] literacy tests and similar voting qualifications were suspended for a period of five years from the last occurrence of substantial voting discrimination. However, Congress apparently feared that the mere suspension of existing tests would not completely solve the problem, given the history some States had of simply enacting new and slightly different requirements with the same discriminatory effect.[4] Not underestimating the ingenuity of those bent on preventing Negroes from voting, Congress therefore enacted § 5, the central focus of these cases.

Under § 5, if a State covered by the Act passes any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," no person can be deprived of his right to vote "for failure to comply with" the new enactment "unless and until"

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for the Southern District of Mississippi. No. 3 is a direct appeal from the United States District Court for the Eastern District of Virginia.

[3] Both States involved in these cases have been determined to be covered by the Act. 30 Fed. Reg. 9897 (August 6, 1965).

[4] See H. R. Rep. No. 439, 89th Cong., 1st Sess., at 10–11; S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., at 8, 12.

the State seeks and receives a declaratory judgment in the United States District Court for the District of Columbia that the new enactment "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. I). See Appendix, *infra*.

However, § 5 does not necessitate that a covered State obtain a declaratory judgment action before it can enforce any change in its election laws. It provides that a State may enforce a new enactment if the State submits the new provision to the Attorney General of the United States and, within 60 days of the submission, the Attorney General does not formally object to the new statute or regulation. The Attorney General does not act as a court in approving or disapproving the state legislation. If the Attorney General objects to the new enactment, the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia. Also, the State is not required to first submit the new enactment to the Attorney General as it may go directly to the District Court for the District of Columbia. The provision for submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable.[5] Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5.

[5] At the oral argument in the Mississippi cases, Assistant Attorney General Pollak stated that the Department of Justice had received 251 submissions from the States under § 5. He further stated that the Department withheld consent in only one case, and that was where the change was contrary to a prior court decision on the same issue. He said that in two other instances the State inad-

In these four cases, the State has passed new laws or new regulations. The central issue is whether these enactments fall within the prohibition of § 5 that prevents the enforcement of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless the State first complies with one of the section's approval procedures.

No. 25, *Fairley* v. *Patterson*, involves a 1966 amendment to § 2870 of the Mississippi Code of 1942.[6] The amendment provides that the board of supervisors of each county may adopt an order providing that board members be elected at large by all qualified electors of the county. Prior to the 1966 amendments, all counties by law were divided into five districts; each district elected one member of the board of supervisors. After the amendment, Adams and Forrest Counties adopted the authorized orders, specifying that each candidate must run at large, but also requiring that each candidate be a resident of the county district he sought to represent.

The appellants are qualified electors and potential candidates in the two counties. They sought a declaratory judgment in the United States District Court for the Southern District of Mississippi that the amendment to § 2870 was subject to the provisions of § 5 and hence could not be enforced until the State complied with the approval requirements of § 5.[7]

No. 26, *Bunton* v. *Patterson*, concerns a 1966 amendment to § 6271–08 of the Mississippi Code.[8] The amend-

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vertently incorporated by reference another section of state law that contained a prohibited test or device. Transcript of Argument, at 63.

[6] See Appendix, *infra*.

[7] In all three cases from Mississippi the original complaint contained other grounds for relief; however, before hearing in the District Court, the parties stipulated that the only issue for decision was whether § 5 applied.

[8] See Appendix, *infra*.

ment provides that in 11 specified counties, the county superintendent of education shall be appointed by the board of education. Before the enactment of this amendment, all these counties had the option of electing or appointing the superintendent. Appellants are qualified electors and potential candidates for the position of county superintendent of education in three of the counties covered by the 1966 amendment. They sought a declaratory judgment that the amendment was subject to § 5, and thus unenforceable unless the State complied with the § 5 approval requirements.

No. 36, *Whitley* v. *Williams*, involves a 1966 amendment to § 3260 of the Mississippi Code, which changed the requirements for independent candidates running in general elections.[9] The amendment provides for four revisions: (1) it establishes a new rule that no person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election; (2) the time for filing a petition as an independent candidate is changed to 60 days before the primary election from the previous 40 days before the general election; (3) the number of signatures of qualified electors needed for the independent qualifying petition is increased substantially; and (4) a new provision is added that each qualified elector who signs the independent qualifying petition must personally sign the petition and must include his polling precinct and county. Appellants are potential candidates whose nominating petitions for independent listing on the ballot were rejected for failure to comply with one or more of the amended provisions.[10]

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[9] See Appendix, *infra*.

[10] The suit was first brought in 1966. Pending a decision on the merits, a three-judge District Court ordered appellants placed on the 1966 general election ballot. *Whitley* v. *Johnson*, 260 F. Supp. 630 (D. C. S. D. Miss. 1966). Later, other members of the class

In all three of these cases, the three-judge District Court ruled that the amendments to the Mississippi Code did "not come within the purview of and [are] not covered by" § 5, and dismissed the complaints.[11] Appellants brought direct appeals to this Court.[12] We consolidated the cases and postponed consideration of jurisdiction to a hearing on the merits. 392 U. S. 902 (1968).

No. 3, *Allen* v. *Board of Elections*, concerns a bulletin issued by the Virginia Board of Elections to all election judges. The bulletin was an attempt to modify the provisions of § 24–252 of the Code of Virginia of 1950 which provides, *inter alia*, that "any voter [may] place on the official ballot the name of any person *in his own handwriting* . . . ."[13] The Virginia Code (§ 24–251) further provides that voters with a physical incapacity may be assisted in preparing their ballots. For example, one who is blind may be aided in the preparation of his ballot by a person of his choice. Those unable to mark their ballot due to any other physical disability may be assisted by one of the election judges. However, no statutory provision is made for assistance to those who wish to write in a name, but who are unable to do so because of illiteracy. When Virginia was brought under the coverage of the Voting Rights Act of 1965, Virginia election officials apparently thought that the provision in § 24–252, requiring a voter to cast a write-in vote in the voter's own handwriting, was incompatible with the

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which appellants represent were denied places on the ballot for the 1967 general election for failing to comply with the amendment requirements.

[11] No. 25, 282 F. Supp. 164, — (D. C. S. D. Miss. 1968); No. 26, 282 F. Supp. 918, — (D. C. S. D. Miss. 1968); No. 36, — F. Supp. — (D. C. S. D. Miss. 1968).

[12] Appellants assert that this Court has jurisdiction on direct appeal under 28 U. S. C. § 1253 (1964 ed.) and 42 U. S. C. § 1973c (1964 ed., Supp. I).

[13] (Emphasis added.) See Appendix, *infra*.

provisions of the Act suspending the enforcement of any test or device as a prerequisite to voting.[14] Thus, the Board of Elections issued a bulletin to all election judges, instructing that the election judge could aid any qualified voter in the preparation of his ballot, if the voter so requests and if the voter is unable to mark his ballot due to illiteracy.[15]

Appellants are functionally illiterate registered voters from the Fourth Congressional District of Virginia. They brought a declaratory judgment action in the United States District Court for the Eastern District of Virginia, claiming that § 24–252 and the modifying bulletin violate the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act of 1965. A three-judge court was convened and the complaint dismissed.[16] A direct appeal was brought to this Court and we postponed consideration of jurisdiction to a hearing on the merits. 392 U. S. 902 (1968).

In the 1966 elections, appellants attempted to vote for a write-in candidate by sticking labels, printed with the name of their candidate, on the ballot. The election officials refused to count appellants' ballots, claiming that the Virginia election law did not authorize marking ballots with labels. As the election outcome would not have been changed had the disputed ballots been counted, appellants sought only prospective relief. In the District

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[14] 79 Stat. 438, 42 U. S. C. § 1973b (a) (1964 ed., Supp. I). The Act defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter . . . ." 79 Stat. 438, 42 U. S. C. § 1973b (b) (1964 ed., Supp. I).

[15] See Appendix, *infra*.

[16] *Allen* v. *State Board of Elections*, 268 F. Supp. 218 (D. C. E. D. Va. 1967). The District Court ruled that the requirement that write-in votes be in the voter's own handwriting was not unconstitutional; the court further ruled that § 24–252 was not suspended by § 4 of the Voting Rights Act as it was not a "test or devise" as defined by the Act.

Court, appellants did not assert that § 5 precluded enforcement of the procedure prescribed by the bulletin. Rather, they argued § 4 suspended altogether the requirement of § 24–252 that the voter write the name of his choice in the voter's own handwriting. Appellants first raised the applicability of § 5 in their jurisdictional statement filed with this Court. We are not precluded from considering the applicability of § 5, however. The Virginia legislation was generally attacked on the grounds that it was inconsistent with the Voting Rights Act; where all the facts are undisputed, this Court may, in the interests of judicial economy, determine the applicability of the provisions of that Act, even though some specific sections were not argued below.[17]

We postponed consideration of our jurisdiction in these cases to a hearing on the merits. Therefore, before reaching the merits, we first determine whether these cases are properly before us on direct appeal from the district courts.

I.

These suits were instituted by private citizens; an initial question is whether private litigants may invoke the jurisdiction of the district courts to obtain the relief requested in these suits. 28 U. S. C. § 1343 provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U. S. C. § 1343 (4) (1964 ed.). Clearly, if § 5 authorizes appellants to secure the relief sought, the district courts had jurisdiction over these suits.

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[17] See *Boynton* v. *Virginia*, 364 U. S. 454, 457 (1960); cf. *Bell* v. *Maryland*, 378 U. S. 226, 237–242 (1963); *Silber* v. *United States*, 370 U. S. 717, 718 (1962).

The Voting Rights Act does not explicitly grant or deny private parties' authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act.[18] However, § 5 does provide that "no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]." Analysis of this language in light of the major purpose of the Act indicates that appellants may seek a declaratory judgment that a new state enactment is governed by § 5. Further, after proving that the State has failed to submit the covered enactment for § 5 approval, the private party has standing to obtain an injunction against further enforcement, pending the State's submission of the legislation pursuant to § 5.[19]

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[18] Section 12 (f) of the Act, 79 Stat. 443, 42 U. S. C. § 1973j (f) (1964 ed., Supp. I), provides: "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether *a person* asserting rights under the provisions of this subchapter shall have exhausted any administrative or other remedies that may be provided by law." (Emphasis added.)

Appellants have argued this section necessarily implies that private parties may bring suit under the Act, relying on the language "a person." While this argument has some force, the question is not free from doubt, since the specific references throughout the other subsections of § 12 are to the Attorney General. *E. g.*, §§ 12 (d) and 12 (e). However, we find merit in the argument that the specific references to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as "private" rights. See *United States* v. *Raines*, 362 U. S. 17, 27 (1960).

In any event, there is certainly no specific exclusion of private actions. Section 12 (f) is at least compatible with 28 U. S. C. § 1343 and might be viewed as authorizing private actions.

[19] It is important to distinguish the instant cases from those brought by States seeking a declaratory judgment that its new voting laws do not have a discriminatory purpose or effect. Cf. *Apache County* v. *United States*, 256 F. Supp. 903 (D. C. D. C. 1966). In

The Act was drafted to make the guarantee of the Fifteenth Amendment finally a reality for all citizens. *South Carolina* v. *Katzenbach, supra,* at 308, 309. Congress realized that existing remedies were inadequate to accomplish this purpose and drafted an unusual, and in some aspects a severe, procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws.[20]

The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.[21] For example, the provisions of the Act extend to States and the *subdivisions thereof.* The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government.[22]

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the latter type of cases the substantive questions necessary for approval (*i. e.*, discriminatory purpose or effect) are litigated, while in the cases here decided the only question is whether the new legislation must be submitted for approval.

[20] Appellees argue that § 5 only conferred a new "remedy" on the Attorney General of the United States. They argue that it gave citizens no new "rights," rather it merely gave the Attorney General a more effective means of enforcing the guarantees of the Fifteenth Amendment. It is unnecessary to reach the question of whether the Act creates new "rights" or merely gives plaintiffs seeking to enforce existing rights new "remedies." However the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigant.

[21] The enforcement provisions provide that the Attorney General "*may* institute . . . an action." 79 Stat. 443, 42 U. S. C. §§ 1973j (d), (e) (1964 ed., Supp. I) (emphasis added). Of course the private litigant could always bring suit under the Fifteenth Amendment. But it was the inadequacy of just these suits for securing the right to vote that prompted Congress to pass the Voting Rights Act. *South Carolina* v. *Katzenbach, supra,* at 309.

[22] As of January 1968, the Attorney General had brought only one action to force a State to comply with § 5. United States Commission on Civil Rights, Political Participation, 1968, at 164–165.

It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.

We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action. In *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), we were called upon to consider § 14 (a) of the Securities Exchange Act of 1934. 48 Stat. 895, 15 U. S. C. § 78n (a) (1964 ed.). That section provides that it shall be "unlawful for any person . . . . [to violate] such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." We held that "[W]hile this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 U. S., at 432.

A similar analysis is applicable here. The guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition.[23]

II.

Another question involving the jurisdiction of the the district courts is presented by § 14 (b) of the Act. It provides that "No court other than the District

[23] It is significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits. Memorandum of the United States as *Amicus Curiae*, at 8, n. 7.

Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to [§ 5] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this subchapter . . . ." 79 Stat. 445, 42 U. S. C. § 1973*l* (b) (1964 ed., Supp. I). The appellants sought declaratory judgments that the state enactments were subject to § 5 of the Act; appellees thus argue that these actions could be initiated only in the District Court for the District of Columbia.

Section 14 (b) must be read with the Act's other enforcement provisions. Section 12 (f) provides that the district courts shall have jurisdiction over actions brought pursuant to § 12 (d) to enjoin persons from acting when "there are reasonable grounds to believe that [such person] is about to engage in any act or practice prohibited by [§ 5]."[24] These § 12 (f) injunctive actions are distinguishable from the actions mentioned in § 14 (b). The § 14 (b) injunctive action is one aimed at prohibiting enforcement of the provisions of the Voting Rights Act, and would involve an attack on the constitutionality of the Act itself. See *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966). On the other hand, the § 12 (f) action is aimed at prohibiting the enforcement of a state enactment that is for some reason violative of the Act. Cf. *United States* v. *Ward,* 352 F. 2d 329 (C. A. 5th Cir. 1965); *Perez* v. *Rhiddlehoover,* 247 F. Supp. 65 (D. C. E. D. La. 1965).

A similar distinction is possible with respect to declaratory judgments. A declaratory judgment brought by the *State* pursuant to § 5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a private litigant does not require the Court to reach this difficult substantive issue. The only

[24] 79 Stat. 443, 42 U. S. C. § 1973j (d), (f) (1964 ed., Supp. I).

issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. The difference in the magnitude of these two issues suggests that Congress did not intend that both can be decided only by the District of Columbia District Court. Indeed, the specific grant of jurisdiction to the district courts in § 12 (f) indicates Congress intended to treat "coverage" questions differently than "substantive discrimination" questions. See *Perez* v. *Rhiddlehoover, supra,* at 72.

Moreover, as we indicated in *South Carolina* v. *Katzenbach, supra,* the power of Congress to require suits be brought only in the District of Columbia District Court is grounded in Congress' power, under Art. III, § 1, to "ordain and establish" inferior federal tribunals. We further noted Congress did not exceed constitutional bounds in imposing limitations on *"litigation against the Federal Government. . . ."* 383 U. S., at 332 (emphasis added). Of course, in declaratory judgment actions brought by private litigants, the United States will not be a party. This distinction further suggests interpreting § 14 (b) as applying only to declaratory judgment actions brought by the State.

There are strong reasons for adoption of this interpretation. Requiring that declaratory judgment actions be brought in the District of Columbia places a burden on the plaintiff. The enormity of the burden, of course, will vary with the size of the plaintiff's resources. Admittedly, it would be easier for States to bring § 5 actions in the district courts in their own States. However, the State has sufficient resources to prosecute the actions easily in the Nation's capital; and, Congress has power to regulate which federal court shall hear suits against the Federal Government. On the other hand, the individual litigant will often not have sufficient resources

to maintain an action easily outside the district in which he resides, especially in cases where the individual litigant is attacking a local city or county regulation. Thus for the individual litigant, the District of Columbia burden may be sufficient to preclude him from bringing suit.

We hold that the restriction of § 14 (b) does not apply to suits brought by private litigants seeking a declaratory judgment that a new state enactment is subject to the approval requirements of § 5, and that these actions may be brought in the local district court pursuant to 28 U. S. C. § 1343 (4).

III.

A final jurisdictional question remains. These actions were all heard before three-judge district courts. We have jurisdiction over an appeal brought directly from the three-judge court only if the three-judge court was properly convened. *Pennsylvania Public Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U. S. 281 (1965); *Zemel* v. *Rusk*, 381 U. S. 1, 5 (1965); see 28 U. S. C. § 1253 (1964 ed.). Appellants initially claimed that the statutes and regulations in question violated the Fifteenth Amendment. However, by stipulation these claims were removed from the cases prior to a hearing in the District Court and the cases were submitted solely on the question of the applicability of § 5.[25] We held in *Swift & Co.* v. *Wickham*, 382 U. S. 111, 127 (1965), that a three-judge court is not required under 28 U. S. C. § 2281 if the state statute is attacked on the grounds that it is in conflict with a federal statute and consequently violates the Supremacy Clause. These suits involve such

[25] This jurisdictional question does not apply to No. 3, however. In No. 3, the three-judge court also considered and ruled on appellants' claims that the Virginia statute and regulations were in conflict with the Constitution. 268 F. Supp. 218, 220 (D. C. E. D. Va. 1967). Thus, No. 3 is properly before this Court on direct appeal. 28 U. S. C. § 1253 (1964 ed.).

an attack and, in the absence of a statute authorizing a three-judge court, would not be proper before a district court of three judges.

Appellants maintain that § 5 authorizes a three-judge court in suits brought by private litigants to enforce the approval requirements of the section. The final sentence of § 5 provides that "Any action *under this section* shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court." 42 U. S. C. § 1973c (1964 ed., Supp. I) (emphasis added). Appellees argue that this sentence refers only to the action specifically mentioned in the first sentence of § 5 (*i. e.*, declaratory judgment suits brought by the State) and does not apply to suits brought by the private litigant.

As we have interpreted § 5, suits involving the section may be brought in at least three ways. First, of course, the State may institute a declaratory judgment action. Second, an individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny. Third, the Attorney General may bring an injunctive action to prohibit the enforcement of a new regulation because of the State's failure to obtain approval under § 5. All these suits may be viewed as being brought "under" § 5. The issue is whether the language "under this section" should be interpreted as authorizing a three-judge action in these suits.

We have long held that congressional enactments providing for the convening of three-judge courts must be strictly construed. *Phillips* v. *United States,* 312 U. S. 246 (1946). Convening a three-judge court places a burden on our federal court system, and may often result in a delay in a matter needing swift initial adjudication. See *Swift & Co.* v. *Wickham, supra,* at 128. Also, a

direct appeal may be taken from a three-judge court to this Court, thus depriving us of the wise and often crucial adjudications of the courts of appeal. Thus we have been reluctant to extend the range of cases necessitating the convening of three-judge courts. *Ibid.*

However, we have not been unaware of the legitimate reasons that prompted Congress to enact three-judge court legislation. See *Swift & Co.* v. *Wickham, supra,* at 116–119. Notwithstanding the problems for judicial administration, Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration.[26] The Voting Rights Act of 1965 is an example. Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system. The problems are especially difficult when the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure.

In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5. The result of both

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[26] See, *e. g.*, 42 Stat. 168, 7 U. S. C. § 217 (1964 ed.) (suits to restrain enforcement of orders of the Secretary of Agriculture); 28 U. S. C. § 2282 (1964 ed.) (suits to enjoin enforcement of federal statute); 63 Stat. 479, 49 U. S. C. § 305 (g) (1964 ed.) (suits to review negative orders of the ICC).

suits can be an injunction prohibiting the State from enforcing its election laws. Although a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains.

Other provisions of the Act indicate that Congress was well aware of the extraordinary effect the Act might have on federal-state relationships and the orderly operation of state government. For example, § 10, which prohibits the collection of poll taxes as a prerequisite to voting, contains a provision authorizing a three-judge court when the Attorney General brings an action "against the enforcement of any requirement of the payment of a poll tax as a precondition to voting . . . ." 79 Stat. 442, 42 U. S. C. §§ 1973h (a)–(c) (1964 ed., Supp. I). See also 42 U. S. C. § 1973b (a) (1964 ed., Supp. I).

We conclude that in light of the extraordinary nature of the Act in general, and the especially unique approval requirements of § 5, Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges.

IV.

Finding that these cases are properly before us, we turn to a consideration of whether these state enactments are subject to the approval requirements of § 5. These requirements apply to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ." 42 U. S. C. § 1973c (1964 ed., Supp. I). The Act further provides that the term "voting" "shall include all action necessary to make a vote effective in any primary, special, or general election, including but not limited to registration, listing . . . or any other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public

or party office and propositions for which votes are received in an election." See Appendix, *infra*. Appellees in the Mississippi cases maintain that § 5 covers only those state enactments which prescribe who may register to vote. While accepting that the Act is broad enough to insure that the votes of all citizens should be cast, appellees urge that § 5 does not cover state rules relating to the qualification of candidates or to state decisions as to which offices shall be elective.

Appellees rely on the legislative history of the Act to support their view, citing the testimony of then Assistant Attorney General Burke Marshall before a subcommittee of the House Committee on the Judiciary:

> "Mr. CORMAN. 'We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964. Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?'
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> "Mr. MARSHALL. 'The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort I would like to see it corrected, but that is not what we were trying to deal with in the bill.' " [27]

Appellees in No. 25 also argue that § 5 was not intended to apply to a change from district to at-large voting, because application of § 5 would cause a conflict in the administration of reapportionment legislation. They contend that under such a broad reading of § 5,

[27] Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., at 74 (hereinafter House Hearings).

enforcement of a reapportionment plan could be enjoined for failure to meet the § 5 approval requirements, even though the plan had been approved by a federal court.[28] Appellees urge that Congress could not have intended to force the States to submit a reapportionment plan to two different courts.[29]

We must reject the narrow construction that appellees would give to § 5. The Voting Rights Act was aimed at the subtle, as well as the obvious state regulations which have the effect of denying citizens their right to vote because of their race.[30] Moreover, compatible with

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[28] For example, appellees argue that even though a redistricting plan had been approved by a federal district court, under a broad interpretation of § 5, the Attorney General might bring suit under § 12 (d) (79 Stat. 443, 42 U. S. C. § 1973j (d) (1964 ed., Supp. I)) seeking an injunction because the State had failed to comply with the approval requirements of § 5.

[29] Appellees in No. 3 also argue that § 5 does not apply to the regulation in their case, because that regulation was passed in an attempt to comply with the provisions of the Voting Rights Act. They argue that if § 5 applies to the Virginia regulation, covered States would be prohibited from quickly complying with the Act. We cannot accept this argument, however. A State is not exempted from the coverage of § 5 merely because its legislation is passed in an attempt to comply with the provisions of the Act. To hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from § 5 coverage—even though it would have the effect of racial discrimination. It is precisely this circumstance Congress sought to avoid in passing § 5.

[30] "Congress knew that some of the States covered by § 4 (b) of the Act had resorted to the extraordinary strategem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 337 (1966).

the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes "all action necessary to make a vote effective." 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(1) (1964 ed., Supp. I). See *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964). We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the § 5 approval requirements.

The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way. For example, § 2 of the Act, as originally drafted, included a prohibition against any "qualification or procedure." During the Senate hearings on the bill, Senator Fong expressed concern that the word "procedure" was not broad enough to cover various practices that might effectively be employed to deny citizens their right to vote. In response, the Attorney General said he had no objection to expanding the language of the section, as the word "procedure" "was intended to be all inclusive of any kind of practice." [51] Indicative of an intention

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[51] Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., at 191–192 (hereinafter Senate Hearings):

"Senator FONG. 'Mr. Attorney General, turning to section 2 of the bill, which reads as follows:

"'No voting qualification or procedure shall be imposed or applied to deny or abridge the right to vote on account of race or color—' there is no definition of the word 'procedure' here. I am a little afraid that there may be certain practices that you may not be able to include in the word 'procedure.'

"For example, if there should be a certain statute in a State that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure.' Could you?

"Attorney General KATZENBACH. I would suppose that you could if it had that purpose. I had thought of the word 'procedure' as

to give the Act the broadest possible scope, Congress expanded the language in the final version of § 2 to include any "voting qualification or prerequisite to voting, or standard, practice, or procedure." 42 U. S. C. § 1973 (1964 ed., Supp. I).

Similarly, in the House hearings, it was emphasized that § 5 was to have a broad scope:

> "Mr. KATZENBACH. 'The justification for [the approval requirements] is simply this: Our experience in the areas that would be covered by this bill has been such to indicate frequently on the part of State legislatures a desire to outguess the courts of the United States or even to outguess the Congress of the United States. . . . [A]s the Chairman may recall . . . at the time of the initial school desegregation, . . . the legislature passed I don't know

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including any kind of practice of that kind if its purpose or effect was to deny or abridge the right to vote on account of race or color.

"Senator FONG. The way it is now written, do you think there may be a possibility that the Court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

"Attorney General KATZENBACH. I do not believe so, Senator, although the committee might consider that. The language was used in the 1964 act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

"Senator FONG. You would have no objection to expanding the word 'procedure'?

"Attorney General KATZENBACH. No; it was intended to be all-inclusive of any kind of practice.

"Senator FONG. I know that in section 3 (a) you have very much in detail spelled out the words 'test or device.'

"Attorney General KATZENBACH. Yes.

"Senator FONG. But you have not spelled out the word 'procedure.' I think that the word 'procedure' should be spelled out a little more.

"Attorney General KATZENBACH. I think that is a good suggestion, Senator,"

> how many laws in the shortest period of time. Every time the judge issued a decree, the legislature . . . passed a law to frustrate that decree.
>
> "'If I recollect correctly, the school board was ordered to do something and the legislature immediately took away all authority of the school boards. They withdrew all funds from them to accomplish the purposes of the act.'" House Hearings, at 60.

Also, the remarks of both opponents and proponents during the debate over passage of the Act demonstrate that Congress was well aware of another admonition of the Attorney General.[32] He had told the House hearings that two or three types of changes in state election law (such as changing from paper ballots to voting machines) could be specifically excluded from § 5 without undermining the purpose of the section. He emphasized, however, that there were "precious few" changes that could be excluded "because there are an awful lot of things that could be started for purposes of evading the Fifteenth Amendment if there is a desire to do so." House Hearings, at 95. It is significant that Congress chose not to include even these minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny.

In light of the mass of legislative history to the contrary, especially the Attorney General's clear indication that the section was to have a broad scope and Congress' refusal to engraft even minor exceptions, the single remark of Assistant Attorney General Burke Marshall cannot be given determinative weight. Indeed, in any case where the legislative hearings and debate are so voluminous, no single statement or excerpt of testimony can

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[32] *E. g.*, 111 Cong. Rec. 10727 (Remarks of Senator Tydings); 111 Cong. Rec. 10725 (Remarks of Senator Talmadge); 111 Cong. Rec. 8303 (Remarks of Senator Hart).

be conclusive.[33] Also, the question of whether § 5 might cause problems in the implementation of reapportionment legislation is not properly before us at this time. There is no direct conflict between our interpretation of this statute and the principles involved in the reapportionment cases. The argument that some administrative problem might arise in the future does not establish that Congress intended that § 5 have a narrow scope; we leave to another case a consideration of any possible conflict.

The weight of the legislative history and an analysis of the basic purposes of the Act indicate that the enactment in each of these cases constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of § 5.

No. 25 involves a change from district to at-large voting for county supervisors. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964). Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

In No. 26 an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after

[33] "The House and Senate Committee on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–309 (1966).

the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be done either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny.

The changes in No. 36 appear aimed at increasing the difficulty for an independent candidate to gain a position on the general election ballot. These changes might also undermine the effectiveness of voters who wish to elect independent candidates. One change involved in No. 36 deserves special note. The amendment provides that no person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election. This is a "procedure with respect to voting" with substantial impact. One must forgo his right to vote in his party primary if he thinks he might later wish to become an independent candidate.

The bulletin in No. 3 outlines new procedures for casting write-in votes. As in all these cases, we do not consider whether this change has a discriminatory purpose or effect. It is clear, however, that the new procedure with respect to voting is different than the procedure in effect when the State became subject to the Act; therefore, the enactment must meet the approval requirements of § 5 in order to be enforceable.

In these cases, as in so many others that come before us, we are called upon to determine the applicability of a statute where the language of the statute does not make crystal clear its intended scope. In all such cases we are compelled to resort to the legislative history to determine whether, in light of the articulated purposes for the legislation, Congress intended that the statute apply to the particular cases in question. We are of the opinion that, with the exception of the statement of Assistant Attorney General Burke Marshall, the balance of

legislative history (including the statements of the Attorney General and congressional action expanding the language) indicates that § 5 applies to these cases. In saying this, we of course express no view on the merit of these enactments; we also emphasize that our decision indicates no opinion concerning their constitutionality.

V.

Appellees in the Mississippi cases argue that even if these state enactments are covered by § 5, they may now be enforced, since the States submitted them to the Attorney General and he has failed to object. While appellees admit that they have made no "formal" submission to the Attorney General, they argue that no formality is required. They say that once the Attorney General has become aware of the state enactment, the enactment has been "submitted" for purposes of § 5. Appellees contend that the Attorney General became aware of the enactments when served with a copy of appellees' briefs in these cases.

We reject this argument. While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the Attorney General constituted a "submission." A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.

VI.

Appellants in the Mississippi cases have asked this Court to set aside the elections conducted pursuant to these enactments and order that new elections be held

under the preamendment laws. The Solicitor General has also urged us to order new elections, if the State does not promptly institute § 5 approval proceedings. We decline to take corrective action of such consequence, however. These § 5 coverage questions involve complex issues of first impression—issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the appellee's failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of these statutes, if any, has not been determined by any court. We give only prospective effect to our decision, bearing in mind that our judgment today does not end the matter so far as these States are concerned. They remain subject to the continuing strictures of § 5 until they obtain from the United States District Court for the District of Columbia a declaratory judgment that for at least five years they have not used the "tests or devices" prohibited by § 4. 42 U. S. C. § 1973b (a) (1964 ed., Supp. I).

In No. 3 the judgment of the District Court is vacated; in Nos. 25, 26, and 36 the judgments of the District Court are reversed. All four cases are remanded to the District Courts with instructions to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5.

It is so ordered.

APPENDIX.

Changes in the statutes are indicated as follows: material added by amendment is italicized; material deleted by amendment is underscored; portions of the statutes unchanged by the amendment are printed in plain roman.

Section 5 of the Voting Rights Act of 1965:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) [42 U. S. C. § 1973b (a)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard,

practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court." 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. I).

The Act further provides:

"The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including but not limited to, registration listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(1) (1964 ed., Supp. I).

Section 2870 of the Mississippi Code:

"Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one (1) member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceeding of the board.

"The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking

that the districts of the county be changed, or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

"Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and/or more than fifty per cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

"Provided further, however, that in any county in the state bordering on the Gulf of Mexico or Mississippi Sound and having a population in excess of eighty thousand (80,000) according to the last federal census, the issue of election heretofore provided for shall be determined by a majority of the qualified electors of the county, and if such majority fail to vote affirmatively, no new petition shall be considered for four (4) years. Each such election shall be based upon a petition of twenty-five per cent (25%) of the qualified electors of the county, and to which petition shall be attached a map or plat defining the boundaries of each beat as proposed by said map or plat, and the election thereon shall be on such proposal.

"And the board, whenever a majority of the qualified electors of the county shall have voted to change or alter the existing districts to those set forth and described in the petition, shall at its first meeting thereafter establish said proposed districts by order on its minutes, to be effective on the first day of January following, and in

default thereof, may be commanded to do so by writ of mandamus.

"When the districts are changed, by the qualified electors in an election as aforesaid, the board, of its own motion, shall not change or alter said districts within four (4) years thereafter.

"The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next general election wherein said supervisors are elected.

"If twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter all elections for members of boards of supervisors shall be so held. If not, members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing

members of boards of supervisors again until two (2) years have transpired.

"This act shall not be construed to effect any supervisors now holding office until the expiration and end of his present term of office."

Section 6271–08 of the Mississippi Code:

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class Three county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county, the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more

than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial Federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U. S. Highways

49 and 51; and State Highways 16, 17 and 43 and the Natchez Trace; in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U. S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect; in any county created after 1916 through which the Yazoo River flows; in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a land-grant institution or lands contiguous thereto owned by the institution; in any county lying within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960; in any county having a population of twenty-six thousand seven hundred fifty-nine (26,759) according to the 1960 Federal census, and wherein U. S. Highway 51 and U. S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect; in any Class Three county wherein is partially located a national forest and wherein U. S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00; the county superintendent of education hereafter shall be appointed by the county board of education.

"In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972."

Section 3260 of the Mississippi Code:

"The ballot shall contain the names of all candidates who have been put in nomination, not less than forty (40) days previous to the day of the election, by the primary election of any political party. There shall be printed on the ballots the names of all persons so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. *No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election; any independent candidate must qualify on or before the time established by statute for qualification of candidates seeking nominations in primary elections.* The commissioner shall also have printed on the ballot in any general or special election the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office *as an independent candidate* by a petition *filed on or before the statutory time* with said commissioner not less than forty (40) days prior to the election, and signed by not less than the following number of qualified electors:

"(a) For an office elected by the state at large, not less than one thousand (1,000) *ten thousand (10,000)* qualified electors.

"(b) For an office elected by the qualified electors of a supreme court district, not less than three hundred (300) qualified electors *three thousand five hundred (3,500)* qualified electors.

"(c) For an office elected by the qualified electors of a congressional district, not less than two hundred (200) *two thousand (2,000) qualified electors.*

"(d) For an office elected by the qualified electors of a circuit or chancery court district, not less than one hundred (100) *one thousand (1,000)* qualified electors.

"(e) For an office elected by the qualified electors of a county, a senatorial *district,* or floaterial district, *a supervisors district,* or a municipality having a population of one thousand (1,000) or more, not less than *ten per cent (10%) of the qualified electors of said county, senatorial district, supervisors district, or municipality,* or not less than *five hundred (500)* or not less than (50) qualified electors, *whichever is the lesser.*

"(f) For an office elected by the qualified electors of a supervisors district or a municipality having a population of less than one thousand (1,000), not less than fifteen (15) *ten per cent (10%)* of the qualified electors *of said supervisors district or municipality.*

"Each elector shall personally sign said petition which signature shall not be counted unless same includes his polling precinct and county.

"There shall be attached to each petition above provided for upon the time of filing with said commission, a certificate from the appropriate registrar or registrars showing the number of qualified electors appearing upon each such petition which the registrar shall furnish to the petitioner upon request.

"Unless the petition required above shall be filed not less than forty (40) days prior to the election. *Unless the petition required above shall be filed not later than the time required for primary elections,* the name of the person requested to be a candidate, unless nominated by a political party, shall not be placed upon the ballot. The ballot shall contain the names of each candidate for each office, and such names shall be listed under the name of the political party such candidates represents."

Section 24–252 of the Code of Virginia of 1950:

"Insertion of names on ballots.—At all elections except primary elections it shall be lawful for any voter to

place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24–251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

The Bulletin issued by the State Board of Elections:

"On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24–251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

"These instructions also apply to precincts in which voting machines are used."

SUPREME COURT OF THE UNITED STATES

Nos. 3, 25, 26, AND 36.—OCTOBER TERM, 1968.

Richard Allen et al., Appellants, 3 v. State Board of Elections et al.	On Appeal From the United States District Court for the Eastern District of Virginia.
J. C. Fairley et al., Appellants, 25 Joe T. Patterson et al.	On Appeals From the United States District Court for the Southern District of Mississippi.
Charles E. Bunton et al., Appellants, 26 v. Joe T. Patterson et al.	
Clifton Whitley et al., Appellants, 36 v. John Bell Williams et al.	

[March 3, 1969.]

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

The Court's opinion seeks to do justice by granting each side half of what it requests. The majority first grants appellants all they could hope for, by adopting an overly broad construction of § 5 of the Voting Rights Act. As if to compensate for its generosity, the Court then denies some of the same appellants the relief that they deserve. Section 5 is thereby reduced to a dead letter in a very substantial number of situations in which it was intended to have its full effect.[1]

[1] I concur in the Court's disposition of the complex jurisdictional issues these cases present. While I consider the question whether

I.

I shall first consider the Court's extremely broad construction of § 5. It is best to begin by delineating the precise area of difference between the position the majority adopts and the one which I consider represents the better view of the statute. We are in agreement that in requiring federal review of changes in any "standard, practice, or procedure with respect to voting," Congress intended to include all state laws that changed the process by which voters were registered and had their ballots counted. The Court, however, goes further to hold that a State covered by the Act must submit for federal approval all those laws that could arguably have an impact on Negro voting power, even though the manner in which the election is conducted remains unchanged. I believe that this reading of the statute should be rejected on several grounds. It ignores the place of § 5 in the larger structure of the Act; it is untrue to the statute's language; it is unsupported by the legislative history.

A.

First, and most important, the Court's construction ignores the structure of the complex regulatory scheme

§ 5 authorizes a three-judge court a close one, it is clear to me that we would not avoid very many three-judge courts whatever we decide. I would suspect that generally a plaintiff attacking a state statute because it has not been federally approved under § 5 could also make at least a substantial constitutional claim that the state statute is discriminatory in its purpose or effect. Consequently, in the usual case a three-judge court would always be convened under 28 U. S. C. § 2281. Once convened, the Court would, of course, first consider the plaintiff's § 5 argument in the name of avoiding a constitutional question. Therefore, it appears to me that there is no good reason to invoke the normal rule that three-judge court statutes should be construed as narrowly as possible. As the Court suggests, the more natural reading of the statute confers jurisdiction on three-judge courts even in an action brought by private parties.

created by the Voting Rights Act. The Court's opinion assumes that § 5 may be considered apart from the rest of the Act. In fact, however, the provision is clearly designed to march in lock-step with § 4—the two sections cannot be understood apart from one another. Section 4 is one of the Act's central provisions, suspending the operation of all literacy tests and similar "devices"[2] for at least five years in States whose low voter turnout indicated that these "tests" and "devices" had been used to exclude Negroes from the suffrage in the past. Section 5, moreover, reveals that it was not designed to implement new substantive policies but that it was structured to assure the effectiveness of the dramatic step that Congress had taken in § 4. The federal approval procedure found in § 5 only applies to those States whose literacy tests or similar "devices" have been suspended by § 4. As soon as a State regains the right to apply a literacy test or similar "device" under § 4, it also escapes the commands of § 5.

The statutory scheme contains even more striking characteristics which indicate that § 5's federal review procedure is ancillary to § 4's substantive commands. A State may escape § 5, *even though it has consistently violated this provision* so long as it has complied with § 4, and has suspended the operation of literacy tests and other "devices" for five years. On the other hand, no matter how faithfully a State complies with § 5, it

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[2] Section 4 (c) reads:

"The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by voucher of registered voters or members of any other class."

remains subject to its commands so long as it has not consistently obeyed § 4.[3]

As soon as it is recognized that § 5 was designed solely to implement the policies of § 4, it becomes apparent that the Court's decision today permits the tail to wag the dog. For the Court has now construed § 5 to require a revolutionary innovation in American government that goes far beyond that which was accomplished by § 4. The fourth section of the Act had the profoundly important purpose of permitting the Negro people to gain access to the voting booths of the South once and for all. But the action taken by Congress in § 4 proceeded on the premise that once Negroes had gained free access to the ballot box, state governments would then be suitably responsive to their voice, and federal intervention would not be justified. In moving against "tests and devices" in § 4, Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments. The Court now reads § 5, however, as vastly increasing the sphere of federal intervention beyond that contemplated by § 4, despite the fact that the two pro-

[3] The Solicitor General expressly adopts this construction of the statutes in his supplemental *amicus* brief. In any event, the Act is clear: § 4 (a) permits a State to free itself from § 4 by proving to a District Court in the District of Columbia that no *"test or device* has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." (Emphasis supplied.) As already noted, see n. 2, *supra,* the phrase "test or device" is a term of art including a class of statutes much narrower than those included under § 5. However, since § 5 applies by its own terms only to "a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect," a State that escapes from § 4, escapes from § 5 as well, even though it has not complied with that section.

visions were designed simply to interlock. The District Court in the District of Columbia is no longer limited to examining any new state statute that may tend to deny Negroes their right to vote, as the "tests and devices" suspended by § 4 had done. The decision today also requires the special District Court to determine whether various systems of representation favor or disfavor the Negro voter—an area well beyond the scope of § 4. Section 4, for example, does not apply to States and localities which have in the past permitted Negroes to vote freely, but which arguably have limited minority voting power by adopting a system in which various legislative bodies are elected on an at-large basis. And yet, in *Fairley* v. *Bunton*, No. 25, the Court holds that a statute permitting the at-large election of county boards of supervisors must be reviewed by federal authorities under § 5. Moreover, it is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers. If courts cannot intelligently compare such alternatives, it should not be readily inferred that Congress has required them to undertake the task.

The Court's construction of § 5 is even more surprising in light of the Act's regional application. For the statute, as the Court now construes it, deals with a problem that is national in scope. I find it especially difficult to believe that Congress would single out a handful of States as requiring stricter federal supervision concerning their treatment of a problem that may well be just as serious in parts of the North as it is in the South.[4]

[4] Indeed, I would have very substantial constitutional difficulties with the statute if I were to accept such a construction.

The difficulties with the Court's construction increase even further when the language of the statute is considered closely. When standing alone, the statutory formula requiring federal approval for changes in any "standard, practice or procedure with respect to voting" can be read to support either the broad construction adopted by the majority or the one which I have advanced. But the critical formula does not stand alone. Immediately following the statute's description of the federal approval procedure, § 5 proceeds to describe the type of relief an aggrieved voter may obtain if a State enforces a new statute without obtaining the consent of the appropriate federal authorities: ". . . no person shall be denied the right to vote *for failure to comply* with such qualification, prerequisite, standard, practice or procedure." (Emphasis supplied.) This remedy serves to delimit the meaning of the formula in question. Congress was clearly concerned with changes in procedure with which voters could *comply*. But a law, like that in *Fairley* v. *Patterson*, No. 25, which permits all members of the County Board of Supervisors to run in the entire county and not in smaller districts, does not require a voter *to comply* with anything at all, and so does not come within the scope of the language used by Congress. While the Court's opinion entirely ignores the obvious implications of this portion of the statute, the Solicitor General's *amicus* brief candidly admits that this provision is flatly inconsistent with the broad reading the Government has advanced and this Court has adopted. The Government's brief simply suggests that Congress' choice of the verb "comply" was merely the result of an oversight. I cannot accept such a suggestion, however, when Congress' choice of language seems to me to be consistent with the general statutory framework as I understand it.

B.

While the Court's opinion does not confront the factors I have just canvassed, it does attempt to justify its holding on the basis of its understanding "of the legislative history and an analysis of the basic purposes of the Act." *Ante*, p. 23. Turning first to consider the Act's basic purposes, the Court suggests that Congress intended to adopt the concept of voting articulated in *Reynolds* v. *Sims* and protect Negroes against a dilution of their voting power. See *ante*, pp. 20, 23. It is clear, of course, that the Court's reapportionment decisions do not apply of their own force to the problem before us. This is a statute we are interpreting, not a broad constitutional provision whose contours must be defined by this Court. The States are required to submit certain kinds of legislation for federal approval only if Congress, acting within its powers, so provided. And the fact is that Congress consciously *refused* to base § 5 of the Voting Rights Act on its powers under the Fourteenth Amendment, upon which the reapportionment cases are grounded. The Act's preamble states that it is intended "to enforce the Fifteenth Amendment to the United States Constitution and for other purposes." When Senator Fong of Hawaii suggested that the preamble include a citation to the Fourteenth Amendment as well, the Attorney General explained that he "would have quite a strong preference not to," because "I believe that S. 1564 as drafted can be squarely based on the 15th Amendment." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., at 193. Attorney General Katzenbach's position was restated repeatedly,[5]

[5] See, *e. g.*, Senate Hearings, *supra*, at 35, 141; Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., at 102.

and any mention of the Fourteenth Amendment is absent from this portion of the statute.[6]

As the reapportionment cases rest upon the Equal Protection Clause, they cannot be cited to support the claim that Congress, in passing this Act, intended to proceed against state statutes regulating the nature of the constituencies legislators could properly represent. If Congress intended, as it clearly did, to ground § 5 on the Fifteenth Amendment, the leading voting case is not *Reynolds* v. *Sims*, but *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). While that case establishes the proposition that redistricting done with the purpose of excluding Negroes from a municipality violates the Fifteenth Amendment, it also maintains the distinction between an attempt to exclude Negroes totally from the relevant constituency, and a statute that permits Negroes to vote but which uses the gerrymander to contain the impact of Negro suffrage.

It is unnecessary, of course, to decide whether *Gomillion* v. *Lightfoot* marks the limit of the Fifteenth Amendment. It is enough to recognize that Congress did not in any way adopt the reapportionment cases' expansive concept of voting when it enacted the Voting Rights Act of 1965. Once it is determined that *Reynolds* v. *Sims* holds no magic key to the "basic purposes" of this statute, one is obliged to determine the Act's purposes in more traditional ways. And it is here where the Court's opinion fails to convince. As I have already suggested, the Act's structure assigns to § 5 a role that is a good deal more modest than the one which the majority gives it.[7]

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[6] When, in § 10 of the Act, Congress moved against the imposition of poll taxes, it expressly invoked the Fourteenth Amendment as providing an additional basis for its action in this specific area. See § 10 (b).

[7] The Court seeks to strengthen its case by looking to the language of one of the definitional sections of the Act. *Ante*, at 20. Section 14 (c)(1) defines the term "vote" or "voting" to "include

The majority is left, then, relying on its understanding of the legislative history. With all deference, I find that the history the Court has garnered undermines its case, insofar as it is entitled to any weight at all. I refer not only to the unequivocal statement of Assistant Attorney General Burke Marshall, *ante*, at 18, which the Court concedes to be diametrically opposed to the construction it adopts. For the lengthy testimony of Attorney General Katzenbach, upon which the Court seems to rely, actually provides little more support for its position. Mr. Katzenbach, unlike his principal assistant, was never directly confronted with the question raised here, and we are left to guess as to his views. If guesses are to be made, however, surely it is important to note that though the Attorney General used many examples to illustrate the operation of § 5, each of them concerned statutes that had an immediate impact on voter qualifications or which altered the manner in which the election was conducted.[8] One would imagine that if the

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all action necessary to make a vote *effective* in any primary, special, or general election, *including but not limited to*, registration listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." (Emphasis supplied.) All of the aspects of voting that are enumerated in this definition concern the procedures by which voters are processed. When the statute cautions that its enumeration of stages in the election process is not exclusive, it merely indicates that the change of any other procedure that prevents the voter from having his ballot finally counted is also included within the range of the Act's concern. Surely the Court is entirely ignoring the textual context when it seeks to read the italicized phrases as embracing all electoral laws that affect the amount of political power Negroes will derive from the exercise of the franchise, even when the way in which voters are processed remains unchanged.

[8] The examples given by the Attorney General concerned changes in a State's voting age, residence or property requirements; changes

Attorney General believed that § 5 had the remarkable sweep the majority has now given it, one of his hypotheticals would have betrayed that fact.[9]

C.

Section 5, then, should properly be read to require federal approval only of those state laws that change either voter qualifications or the manner in which elections are conducted. This does not mean, however, that

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in the frequency that registrars' offices are open; and changes from paper ballots to machines or vice versa. See House Hearings, at 60–62, 95; Senate Hearings, at 191–192, 237.

[9] The Court specifically relies on three specific colloquies in which Mr. Katzenbach participated to support its understanding of the legislative history. In the most important one, see *ante*, at 20–21, n. 31, Senator Fong expressed concern that § 5, which at that time merely required federal review of changes in state "procedures," would not encompass a state regulation which would radically limit the hours during which new voters could register. The Attorney General agreed that the statute should be elaborated to more clearly include such a change. Since such a law alters the manner in which voters are processed, I fail to see how this colloquy undermines my construction of the section—which clearly requires federal review in cases of the sort Mr. Katzenbach and Senator Fong were discussing. Similarly, a second extract highlighted by the Court, *ante*, at 21–22, is one in which the Attorney General emphasizes that § 5 is intended to prevent the States from evading the requirements of § 4—a point I believe to count strongly in favor of the interpretation I deem the correct one. Finally, it is quite true that the Attorney General opposed carving out exceptions from § 5 that would permit the State to switch from paper ballots to voting machines without federal approval. See *ante*, at 22. But this fact hardly indicates that he or anyone else was of the opinion that the section required review of statutes that did not concern themselves with voting procedures. In fact, on the one occasion that Mr. Katzenbach discussed the reapportionment cases in connection with § 5, he indicated no awareness whatever that § 5 could be construed to apply to cases involving laws that change the voting power of various groups. See House Hearings, *supra*, at 93–94.

the four District Courts in the cases before us were right in unanimously concluding that the Voting Rights Act did not apply. Rather, it seems to me that only the judgment in *Fairley* v. *Patterson*, No. 25, should be affirmed, as that case involves a state statute which simply gives each county the right to elect its Board of Supervisors on an at-large basis.

In *Whitley* v. *Williams*, No. 36, however, Mississippi's new statute both imposes new qualifications on independent voters who wish to nominate a candidate by petition and alters the manner in which such nominations are made.[10] Since the Voting Rights Act explicitly covers "primary" elections, see § 14 (c)(1), the only significant question presented is whether a petitioning procedure should be considered a "primary" within the meaning of the Act. As the nominating petition is the functional equivalent of the political primary, I can perceive no good reason why it should not be included within the ambit of the Act.

The statute involved in *Bunton* v. *Patterson*, No. 26, raises a somewhat more difficult problem of statutory interpretation. If one looks to its impact on the voters, the State's law making the office of school superintendent appointive enacts a "voting qualification" of the most drastic kind. While under the old regime all registered voters could cast a ballot, now none are qualified. On the other hand, one can argue that the concept of a "voting qualification" presupposes that there will be a vote. On balance, I would hold that the statute comes

[10] The statute requires supporters of a candidate to write their own names on the nominating petition, together with their polling district. Moreover, petitions must be filed by an earlier date and must contain many more signatures. The Act also imposes a "voting qualification" on those who wish to vote in a party primary, by providing that they may not subsequently compete with the primary victor by running as an independent candidate.

within § 5. Cf. *Gomillion* v. *Lightfoot, supra.* Such a holding would not, of course, disable the State from adopting an appointive system after the force of § 5 has spent itself.

Finally, Virginia has quite obviously altered the manner in which an election is conducted when for the first time it has been obliged to issue regulations concerning the way in which illiterate voters shall be processed at the polls. Consequently, I would reverse the lower court's decision in the *Allen* case, No. 3.

II.

After straining to expand the scope of § 5 beyond its proper limits, the majority surprisingly refuses to grant appellants in the Mississippi cases[11] the only relief that will effectively implement the Act's purposes. As the Court recognizes, *ante,* at 26, the Voting Rights Act only applies to the States for a limited period of time—Mississippi may free itself from § 5's requirements in 1970.[12] And yet the Court affords appellants in the Mississippi cases only declaratory relief, permitting state

[11] In the *Allen* case, coming from Virginia, the term of the Congressman who gained his seat under procedures that have not been approved under § 5 has already expired. Consequently, only a grant of declaratory relief is appropriate in this case, as the appellants themselves recognize.

[12] Since the Voting Rights Act became effective in Mississippi in August 1965, the State will be able to escape the requirements of § 5 in 1970 by proving that it has not imposed a "test or device" in violation of § 4 for a five-year period. See text, at n. 3, *supra.* Section 5 will only continue to apply after 1970 if Mississippi is found to have continued imposing "tests or devices" after 1965. The Court's decision today, however, does not consider whether any of the statutes involved in these cases impose a "test" or "device" within the meaning of § 4, see n. 2, *supra.* It simply holds that the statutes fall into the much broader class of laws that modify a "standard, practice, or procedure with respect to voting" under § 5.

officials selected in violation of § 5 to hold office until their four-year terms expire in 1971.[13] An election for these offices may never be held in compliance with Congress' commands. And of course, the Court's decision respecting relief does not only control these particular cases. There may have been hundreds of officials throughout the South who began serving long terms in office this November under procedures that have not been federally approved. As a result of this part of the Court's decision, the Voting Rights Act may never play the full role that Congress intended for it.

It seems clear to me that we should issue a conditional injunction in the Mississippi cases along the lines suggested by the Solicitor General, except of course in the *Fairley* case which I think should be affirmed. Unless Mississippi promptly submits its laws either to the Attorney General or the District Court in the District of Columbia, new elections under the pre-existing law should be ordered. Of course, if the laws are promptly submitted for approval, a new election should be required only if the District Court determines that the statute in question is discriminatory either in its purpose or in its effect.

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[13] The state senator, state representative, county supervisor, justice of the peace and constable involved in *Whitley* v. *Williams*, No. 36, were all elected for four-year terms ending in 1971. See Mississippi Code § 3238 (1942). Similarly, the affected county superintendents of education in *Bunton* v. *Patterson*, No. 26, were appointed to four-year terms, expiring in 1971.

While I would affirm in *Fairley* v. *Patterson*, No. 25, the incumbents in that case also will serve until 1971.

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[March 3, 1969.]

Mr. Justice Marshall, whom Mr. Justice Douglas joins, concurring and dissenting.

I join Parts I through V of the Court's opinion. However, largely for the reasons stated in Part II of my Brother Harlan's opinion, I believe the relief suggested by the Solicitor General should be ordered in the Mississippi cases. Accordingly, I dissent from Part VI of the Court's opinion.

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[March 3, 1969.]

Mr. Justice Black, dissenting.

Assuming the validity of the Voting Rights Act of 1965, as the Court does, I would agree with its careful interpretation of the Act, and would further agree with its holding as to jurisdiction and with its disposition of the four cases now before us. But I am still of the opinion that for reasons stated in my dissenting opinion in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 355–362 (1966), a part of § 5 violates the United States Constitution. Section 5 provides that several Southern States cannot effectively amend either their constitutions or laws relating to voting without persuading the United States Attorney General or the United States District

Court for the District of Columbia that the proposed changes in state laws do not have the purpose and will not have the effect of denying to citizens the right to vote on account of race or color. This is reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did. The Southern States were at that time deprived of their right to pass laws on the premise that they were not then a part of the Union and therefore could be treated with all the harshness meted out to conquered provinces. The constitutionality of that doctrine was certainly not clear at that time. And whether the doctrine was constitutional or not, I had thought that the whole Nation had long since repented of the application of this "conquered province" concept, even as to the time immediately following the bitter Civil War. I doubt that any one of the 13 Colonies would have agreed to our Constitution if they had dreamed that the time might come when they would have to go to a United States Attorney General or a District of Columbia Court with hat in hand begging for permission to change their laws. Still less would any of these Colonies have been willing to agree to a Constitution that gave the Federal Government power to force that one Colony to go through such an onerous procedure while all the other former Colonies, now supposedly its sister States, were allowed to retain their full sovereignty. While *Marbury* v. *Madison*, 1 Cranch 137 (1803), held that courts can pass on the constitutionality of state laws already enacted, it certainly did not decide to permit federal courts or federal executive officers to hold up the passage of state laws until federal courts or federal agencies in Washington could pass on them. Proposals to give judges a part in enacting or vetoing legislation before it passed were made and rejected in the Constitutional Convention; another

proposal was made and rejected to permit the Chief Justice of this Court "from time to time [to] recommend such alterations of and additions to the laws of the U. S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union . . . ." See my dissenting opinion in *Griswold* v. *Connecticut*, 381 U. S. 479, 514, n. 6 (1965).

It seems to me it would be wise for us to pause now and then and reflect on the fact that the separate Colonies were passing laws in their legislative bodies before they themselves created this Union, that history emphatically proves that in creating the Union the Colonies intended to retain their original independent power to pass laws, and that no justification can properly be found in the Constitution they created or in any amendment to it for degrading these States to the extent that they cannot even initiate an amendment to their constitution or their laws without first asking the permission of a federal court in the District of Columbia or a United States governmental agency. I would hold § 5 of the 1965 Voting Rights Act unconstitutional insofar as it commands certain selected States to leave their laws in any field unchanged until they get the consent of federal agencies to pass new ones.